

CALIFORNIA COASTAL COMMISSION

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STAFF REPORT AND RECOMMENDATION ON APPEAL SUBSTANTIAL ISSUE DETERMINATION

Local Government: San Diego Unified Port District

Decision: Approved with Conditions

Appeal Number: A-6-PSD-17-0003

Applicant: Brigantine, Inc.

Location: 1360 North Harbor Drive, San Diego, San Diego County

Project Description: Demolition of existing 24,855 sq. ft., 27-ft. high building, 23,285 sq. ft. building platform, 66 concrete piles and remnants of a 565 sq. ft. dock; installation of 53 concrete piles; and construction of a 40,805 sq. ft., 34-ft. high building, 24,960 sq. ft. platform, and 3,370 sq. ft. dock

Appellants: Chair Bochco and Commissioner Shallenberger

Staff Recommendation: Substantial Issue

IMPORTANT HEARING PROCEDURE NOTE

The Commission will not take testimony on this “substantial issue” recommendation unless at least three commissioners request it. The Commission may ask questions of the applicant, any aggrieved person, the Attorney General or the Executive Director prior to determining whether or not to take testimony regarding whether the appeal raises a substantial issue. If the Commission takes testimony regarding whether the appeal raises a substantial issue, testimony is generally and at the discretion of the Chair limited to 3 minutes total per side. Only the applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the hearing. Others may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will occur at a future Commission meeting, during which the Commission will take public testimony.

SUMMARY OF STAFF RECOMMENDATION

A dispute resolution (Dispute Resolution No. A-6-PSD-17-0003) is scheduled for the same meeting as the subject appeal, to address a dispute between the San Diego Unified Port District (“Port”) and Commission staff on whether the subject project is appealable or not. Therefore, the subject appeal will only be heard by the Commission if the dispute resolution hearing results in the Commission’s concurrence with the Executive Director’s determination that the subject project is in fact appealable.

Staff recommends that the Commission, after public hearing, determine that substantial issue exists with respect to the grounds on which the appeal has been filed.

The subject project consists of the complete demolition of an existing pre-coastal restaurant complex that contains two restaurants operated by Anthony’s Fish Grotto, an event facility and coffee stand; and the construction of new restaurant facilities and a dock (Exhibit 1), called the Portside Pier. The restaurant facilities would be located almost entirely on a platform over the San Diego Bay, with the remainder of the project constructed over public tidelands. The entire project site is within the Port’s jurisdiction.

Specifically, the project includes demolition of the existing 24,855 sq. ft., 27-ft. high building, 23,285 sq. ft. platform, 66 concrete piles and remnants of a 565 sq. ft. dock; and the installation of 53 new concrete piles and construction of a 40,805 sq. ft., 34-ft. high complex of new restaurants, 24,960 sq. ft. platform and 3,370 sq. ft. dock for use by patrons of the restaurant complex. The complex is designed to accommodate three restaurants and a gelato/coffee bar and would include a 3,711 sq. ft. public viewing deck located on a portion of the second floor and a 45-in. wide public walkway located around the perimeter of the first floor. Total restaurant seating would increase from 536 to 1,000 seats. Open water coverage would increase by 4,480 sq. ft. over existing with 1,675 sq. ft. due to the expanded building footprint and 2,805 sq. ft. due to the new dock.

The Port has maintained that because the project is for a restaurant, it is non-appealable development under the Port’s Coastal Development Permit (“CDP”) Regulations and Section 30715 of the Coastal Act. In July 2016, the Port issued a draft Mitigated Negative Declaration (“MND”) for the project that stated the future CDP issued by the Port would not be appealable to the Commission. On August 31, 2016, Commission staff provided a comment letter to the Port on the subject project that objected to the Port’s “non-appealable” determination; notified them that the project would be appealable to the Commission and would require an amendment to the Port Master Plan (“PMP”) to incorporate the project into the PMP prior to the Port’s issuance of an appealable CDP; and requested notice of final action on the MND and CDP. This was also reiterated and discussed with the Port at staff’s monthly coordination meetings. The Port approved a CDP for the project on December 13, 2016 but failed to send a notice of final action despite several requests. Accordingly, on February 2, 2017 Commission staff notified the Port that a dispute resolution would be scheduled with the Commission to discuss the appealability of the project, and again requested that the Port provide a notice of final local action by February 6, 2017. Finally, on February 6, 2017, the Port provided a letter notifying the Commission of the Port’s final action on the subject project and refuting the Commission’s authority to appeal the project or pursue a dispute resolution. On February

7, 2017, Commission staff notified the Port that the 10-working day appeal period had commenced. In order to bring the matter to the Commission for consideration, Chair Bochco and Commissioner Shallenberger filed timely appeals.

The Port found that the project conforms to the PMP because “it is the redevelopment of an existing waterfront facility use and is consistent with the existing certified land and water use designations.” However, the project includes expansion of both the building and dock footprint into area that is designated as “Ship Anchorage” in the certified PMP. The “Ship Anchorage” water use designation is intended for ocean-going ships to anchor. Thus, the restaurant use is inconsistent with the existing water use designation and the PMP should have been amended prior to approval of the CDP to change the water use designation from “Ship Anchorage” to the appropriate designation, “Commercial Recreation,” in PMP Table 10 and Figure 11 to allow for an expanded footprint.

The Port also found that the project was consistent with the public access policies of the Coastal Act because the project “will have no impact on public access.” However, the development, as approved by the Port, raises several PMP and Coastal Act consistency issues with regard to public access, and in addition, issues of biological resources and visual quality. While the project includes a public viewing deck and perimeter accessway, it is unlikely that the public will be aware of these amenities as access to them is only available by entering through the restaurant(s), elevator, or outdoor dining area, instead of an exterior entrance directly connecting from the public promenade to the viewing deck and accessway, and public access signage is limited to three proposed signs that are difficult to see due to their small size (6 inch round sign with “PUBLIC ACCESS” printed on top 3 inches of sign), placement (wall-mounted on building), and color (black/bronze). By requiring the public to enter the restaurant building, elevator, or to walk through an area that is clearly used as an outdoor dining area for the restaurant, it is unlikely that the public would be aware of the public access areas or feel welcome in those areas without being a paying customer. The public viewing deck also appears to share the upper deck area with a proposed concessionaire or other restaurant use; so, it is unclear how the general public and concession patrons will share the space without clear protocols which were not established in the Port’s action. In addition, the Port represents the associated dock as a public amenity, although use of the dock will be restricted to boaters dining at the facility, which effectively restricts public access and privatizes the dock.

There is a serious parking deficit in the immediate project area as well as in the entire Centre City Embarcadero planning district located along the San Diego Bay in Downtown San Diego. Parking for the project was calculated based on the increase in area of the new building compared to the existing structure, which is acceptable when a project consists of minor improvements; however, in this case, the existing structure is being completely demolished and redeveloped with a significantly larger one. Furthermore, it is not appropriate to use the existing parking requirement as a baseline because the existing building is pre-coastal and no on- or off-site parking was required as part of the original development. Therefore, because the project consists of substantial

redevelopment and expansion of the existing use, parking should be calculated based on the entire area of the new development.

The project will also increase water coverage which is typically permitted for coastal-dependent uses; however, only a portion of the increase in water coverage (2,805 sq. ft.) is associated with the expanded dock, and the remainder (1,675 sq. ft.) is associated with the expanded restaurant building. The Port has allowed for design modifications such as translucent areas, to be subtracted from the mitigation required for the increase in shading, which do not mitigate the reduction of foraging habitat for birds and is not an appropriate form of mitigation for increased open water coverage. Considering the noted parking deficits of both the project itself and the surrounding vicinity, as well as the large increase in open water coverage, the Port should have considered a reduced-project alternative.

The project includes a large number and size of signs and lights that appear visually obtrusive, especially as they will be visible from both land and water. The proposed complex is not visually compatible with the character of surrounding development, including the Star of India, a historic ship, and the San Diego Maritime Museum; approval therefore could set an adverse precedent for redevelopment of the Embarcadero.

Because of the above-described inconsistencies with the PMP and the Coastal Act, staff recommends that the Commission determine that the project raises a substantial issue regarding conformance with the certified PMP and the public access and recreation policies of the Coastal Act.

Standard of Review: Certified San Diego Unified Port District Port Master Plan and the public access and recreation policies of Chapter 3 of the Coastal Act.

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EXHIBITS

[Exhibit 1 – Draft CDP issued for Portside Pier](#)

[Exhibit 2 – Location Map](#)

[Exhibit 3 – Project Site Plan and Renderings](#)

[Exhibit 4 – Portside Pier Mitigated Negative Declaration Mitigation Measures](#)

[Exhibit 5 – August 31, 2016 CCC Letter Commenting on Portside Pier Mitigated Negative Declaration](#)

[Exhibit 6 –December 2, 2016 Port Response to CCC Comment Letter](#)

[Exhibit 7 – February 2, 2017 CCC Dispute Resolution Letter](#)

[Exhibit 8 – February 6, 2017 Port Response to Dispute Resolution Letter](#)

[Exhibit 9 – Parking Study Area](#)

[Exhibit 10 – Public Comments](#)

I. APPELLANTS CONTEND

The project as approved by the Port does not conform to the certified Port Master Plan (“PMP”). Commissioners Bochco and Shallenberger appealed, and contend that 1) the Port approved the project without adequate public access, including parking provisions; 2) the project is not a coastal dependent use and therefore should not increase open water coverage; 3) the Port should have required that an eelgrass survey be conducted to avoid potential impacts to eelgrass; 4) the Port should have analyzed and considered a reduced-project alternative to avoid or minimize any increase in open water coverage and reduce the parking need; and 5) the amount and size of lighting and signage on the building will distract from views of the bay and be out of character with the surrounding development.

II. LOCAL GOVERNMENT ACTION

The CDP was approved by the Board of Port Commissioners on December 13, 2016 (Board of Port Commissioners Resolution No. 2016-205). Special provisions were attached to the CDP and included return of promenade and parking facilities to pre-construction conditions; implementation of sustainable building design strategies; and compliance with all applicable mitigation, monitoring, and reporting program requirements in the MND for the project (Exhibit 4).

III. APPEAL PROCEDURES

After certification of a Port Master Plan (PMP), the Coastal Act provides for limited appeals to the Coastal Commission of certain port governing body’s actions on coastal development permit applications. The types of appealable projects are outlined in section 30715 of the Coastal Act.

After the port governing body has taken final action on an appealable project, it must send a notice of that approval to the Commission. (Pub. Res. Code, § 30717; 14 C.C.R. § 13641). This notice must indicate how the approved project is “consistent with the certified port master plan and the California Coastal Act.” (14 C.C.R. § 13641(a); Pub. Res. Code § 30717). Upon proper receipt of a valid notice of appealable development, the Commission establishes an appeal period, which runs for 10 working days. (Pub. Res. Code § 30717; 14 C.C.R. § 13641(b)). If an appeal is filed during the appeal period, the effectiveness of the port governing body’s approval of the CDP is suspended until the Commission takes final action on the appeal. (14 C.C.R. § 13641(c)). The Commission will process the appeal in the same manner that it processes appeals from local government actions approving CDPs. (*Ibid*; Pub. Res. Code, § 30717.)

After certification of a PMP, Section 30625(b)(3) of the Coastal Act requires the Commission to hear an appeal of a port decision unless the Commission determines that no substantial issue exists as to conformity with the certified PMP. If the staff recommends “substantial issue” and no Commissioner objects, the Commission may proceed directly to the de novo portion of the hearing on the merits of the project then, or

at a later date. In the context of an appeal of the Port's action to exclude development, pursuant to section 30625(a) of the Coastal Act, the Commission may approve such a determination, deny it or modify it, including a modification where the Commission determines that the development is not excluded and requires a permit and then approving a conditional permit to mitigate for impacts associated with the proposed development.

If the staff recommends "no substantial issue," or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project either immediately or at a subsequent meeting. If the Commission conducts the de novo portion of the hearing on the permit application, the applicable legal standard of review for the Commission to consider is whether the proposed development is in conformity with the certified Port Master Plan and the Chapter 3 policies of the Coastal Act.

The Commission will not take public testimony during this phase of the appeal hearing unless at least three Commissioners request it. The only persons qualified to testify before the Commission at the "substantial issue" stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo portion of the hearing, any person may testify.

IV. SUBSTANTIAL ISSUE MOTION AND RESOLUTION

The staff recommends the Commission adopt the following resolution:

MOTION: *I move that the Commission determine that Appeal No. A-6-PSD-17-0003 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30625 of the Coastal Act.*

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

RESOLUTION: *The Commission hereby finds that Appeal No. A-6-PSD-17-0003 presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30625 of the Coastal Act regarding consistency with the certified Port Master Plan and the public access and recreation policies of the Coastal Act.*

V. SUBSTANTIAL ISSUE FINDINGS AND DECLARATION

The Commission finds and declares as follows:

A. PROJECT DESCRIPTION

On December 13, 2016, the Port approved what it described as a “non-appealable” CDP for the complete demolition of an existing pre-coastal restaurant complex with two restaurants operated by Anthony’s Fish Grotto, an event facility, and coffee stand; and the construction of new restaurant facilities and a dock (Exhibit 1), known as the Portside Pier project. The restaurant facilities would be located almost entirely on a platform over the San Diego Bay, an estuary, with the remainder of the project constructed over public tidelands. The entire project site is within the Port’s jurisdiction.

Specifically, the project consists of demolition of the existing 24,855 sq. ft., 27-ft. high building, 23,285 sq. ft. building platform, 66 concrete piles and remnants of a 565 sq. ft. dock; and the installation of 53 new concrete piles and construction of a 40,805 sq. ft., 34-ft. high restaurant building, 24,960 sq. ft. platform, and 3,370 sq. ft. dock for use by patrons of the restaurant facilities. The approved building is designed to accommodate three restaurants and a gelato/coffee bar and would include a 3,711 sq. ft. public viewing deck located on a portion of the second floor and a 45-in. wide public walkway located around the perimeter of the first floor (Exhibit 3). Total restaurant seating would increase from 536 to 1,000 seats. Open water coverage would increase by 4,480 sq. ft. over existing with 1,675 sq. ft. due to the expanded building footprint and 2,805 sq. ft. due to the new dock. The height of the new building would increase by 7 feet over the existing building.

The subject site is located on the northeastern side of San Diego Bay adjacent to downtown San Diego in the Centre City Embarcadero planning district of the PMP (Exhibit 2).

B. STANDARD OF REVIEW

Section 30625 (b) of the Coastal Act states:

(b) The commission shall hear an appeal unless it determines the following: [...]

(3) With respect to appeals to the commission after certification of a port master plan, that no substantial issue exists as to conformity with the certified port master plan.

Section 13641(c) of the Administrative Regulations states:

Appeals shall be filed and processed by the Commission in the same manner as appeals from local government actions as set forth in [Chapter 7 of the California Coastal Act](#) and Chapter 5 of these regulations. The filing of an appeal shall suspend the effectiveness of the port governing body's approval until the commission takes final action on the appeal. No appealable development shall be commenced until final approval by the commission becomes effective.

Section 13115(b) of the Administrative Regulations states:

Unless the Commission finds that the appeal raises no significant question as to conformity with the certified local coastal program or, in the case of a permit application for a development between the sea and the first public road paralleling the sea (or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach) that there is no significant question with regard to the public access and public recreation policies of [Chapter 3 of the Coastal Act of 1976](#), the Commission shall consider the application de novo in accordance with the procedures set forth in Sections [13057-13096](#).

Section 30625 of the Coastal Act requires the Commission to consider the certified PMP when deciding substantial issue. Section 13641(c) of the Administrative Regulations requires appeals of a port governing body to be processed in the same manner as local governments. Section 13115(b) of the Administrative Regulations requires the Commission to consider the public access and public recreation policies of Chapter 3 of the Coastal Act when the development is between the sea and the first public road.

Thus, because the project is between the sea and the first public road, as well as over San Diego Bay, an area mapped as an estuary in the original Coastal Plan, the standard of review is the certified Unified Port of San Diego PMP and the public access and public recreation policies of Chapter 3 of the Coastal Act.

C. HISTORY

On May 4, 2016, the project proponent and Port met with Commission staff to provide an introduction to the Portside Pier project. At the meeting, Commission staff raised concerns with public access components of the project, the compatibility of the planned building with surrounding development, and the increase in building scale and open water coverage.

At an August 19, 2016 coordination meeting between Port and Commission staff, following receipt of the draft Mitigated Negative Declaration (“MND”) for the project on August 2, 2016, Commission staff raised objections to the Port’s determination in the MND that the CDP for the project would not be appealable to the Commission because it was a restaurant. Specifically, Commission staff provided direction to the Port that

restaurants are appealable under Section 30715(a)(4) of the Coastal Act and Section 7.d.(4) of the Port's Permit Regulations, because restaurants have no water-oriented purpose consistent with typical port business activities and therefore fall under the category of "shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes." Commission staff again raised concerns with the project design, public access, overwater coverage, and also the calculation of parking required for the project.

In a comment letter on the draft MND, provided to the Port on August 31, 2016, Commission staff reiterated these concerns and requested a notice of final local action for the CDP be sent to Commission staff (Exhibit 5). Commission staff received a California Environmental Quality Act ("CEQA") and Coastal Determination notice for the subject project on December 1, 2016, which included the Port's determination that the project was non-appealable under the Coastal Act, and identified that a non-appealable CDP must be obtained by the applicant.

In the Port's response to the MND comment letter, included in the Final MND as Letter D and received by Commission staff on December 2, 2016, the Port indicated that it continued to believe that the project was non-appealable, but agreed to provide a notice of final local action, stating that "California Coastal Commission staff have been added to the notification list for the final MND and the final action on the CDP" (Exhibit 6). Although minor modifications to the project were made (and reflected in the Final MND) based on comments from Commission staff and other agencies, the changes were not significant enough to bring the project fully into conformance with the PMP or Chapter 3 of the Coastal Act.

On December 13, 2016, the Board of Port Commissioners approved a non-appealable CDP for the project. Following the approval of the CDP, the Port repeatedly failed to send a notice of final local action despite several requests by Commission staff, beginning with an email on January 10, 2017 requesting an update on the status of the project and, if the project had been approved, a notice of the Port's final action. Port staff responded to that email the same day and agreed to send a notice. Subsequently, there were multiple communications (1/12/17 phone call; 1/18/17 phone call; 1/20/17 coordination meeting and 1/30/17 email) in which Commission staff inquired about the status of the final notice of local action and asked the Port to send the notice. Port staff repeatedly indicated that they would be responding; however, the Port did not provide the notice of final local action or any response on the question of appealability. Accordingly, on February 2, 2017 Commission staff notified the Port that a dispute resolution would be scheduled with the Commission to discuss the appealability of the project (Exhibit 7), and to submit a notice of final local action by February 6, 2017. Finally, on February 6, 2017, the Port provided a letter notifying the Commission of the Port's final action on the subject project and refuting the Commission's authority to appeal the project or pursue a dispute resolution (Exhibit 8). On February 7, 2017, Commission staff notified the Port that the 10-working day appeal period had commenced. In order to bring the matter to the full Commission for consideration, Chair Bochco and Commissioner Shallenberger filed timely appeals.

Because the dispute resolution hearing is scheduled for the same meeting as the subject appeal, the subject appeal will only be heard by the Commission if the dispute resolution hearing results in the Commission's concurrence with the Executive Director's determination that the subject project is in fact appealable.

D. CONSISTENCY WITH CERTIFIED PMP

Section 30711(a)(4) of the Coastal Act requires a port master plan to include "proposed projects listed as appealable in Section 30715 in sufficient detail to be able to determine their consistency with the policies of Chapter 3 (commencing with Section 30200) of this division."

Because the project is appealable, a PMP amendment should have been completed prior to the approval of a CDP; however, the Port maintained that a PMP amendment was not required because the project was not appealable to the Commission.

Typically, appealable developments are more specifically described in the PMP and, as such, proposals are listed in the "Project List" for each geographic sub-area in the port. In this case, there is no mention of the redevelopment or expansion of the Anthony's Fish Grotto leasehold in the text, figures, or project list of the certified PMP. Thus, the Commission never had the opportunity to review the project through the PMP amendment process which would have included review of the development under the Chapter 3 policies of the Coastal Act, specifically the public access and recreation provisions, which is critical given the subject site's location over the water and along the downtown waterfront.

In addition, the project includes an expanded footprint of both the building and dock, which extends into water designated as "Ship Anchorage" in the certified PMP. The restaurant use is inconsistent with the "Ship Anchorage" water use designation as "Ship Anchorage" is intended for ocean-going ships to anchor. Thus, the PMP should have been amended prior to approval of the CDP to change the water use designation from "Ship Anchorage" to the appropriate designation, "Commercial Recreation," in Table 10 and Figure 11 of the PMP to allow for an expanded footprint.

Had the Port processed a PMP amendment, it would have been able to add the subject project to the Project List for the Centre City Embarcadero planning district, and change the water use designation from "Ship Anchorage" to the appropriate land use designation "Commercial Recreation" to reflect the expanded building footprint, which would have ensured the project's consistency with the certified PMP. In addition, the project itself would have likely undergone changes to ensure the project's consistency with the Chapter 3 policies of the Coastal Act. Thus, the failure to incorporate the project into the certified PMP and the incompatibility of the restaurant use with the "Ship Anchorage" water designation in the PMP raises a substantial issue.

E. PUBLIC ACCESS

The appellants contend that the project is not consistent with the certified Port Master Plan or the public access and recreation policies of Chapter 3 of the Coastal Act, and that approval of the project will have adverse impacts on public access in regards to physical access to the bay and public parking. The subject development contains a number of inconsistencies with the following Port Master Plan goals and policies:

II. THE PORT DISTRICT, AS TRUSTEE FOR THE PEOPLE OF THE STATE OF CALIFORNIA, WILL ADMINISTER THE TIDELANDS SO AS TO PROVIDE THE GREATEST ECONOMIC, SOCIAL, AND AESTHETIC BENEFITS TO PRESENT AND FUTURE GENERATIONS.

- Consider the entire San Diego Bay as a complete system when promoting the multi-purpose development of the Port District.

VI. THE PORT DISTRICT WILL INTEGRATE THE TIDELANDS INTO A FUNCTIONAL REGIONAL TRANSPORTATION NETWORK

- Improved automobile linkages, parking programs and facilities, so as to minimize the use of waterfront for parking purposes.

IX. THE PORT DISTRICT WILL INSURE PHYSICAL ACCESS TO THE BAY EXCEPT AS NECESSARY TO PROVIDE FOR THE SAFETY AND SECURITY, OR TO AVOID INTERFERENCE WITH WATERFRONT ACTIVITIES.

- Provide “windows to the water” at frequent and convenient locations around the entire periphery of the bay with public right-of-way, automobile parking and other appropriate facilities.
- Provide access along the waterfront wherever possible with promenades and paths where appropriate, and elimination of unnecessary barricades which extend into the water.

In addition, the subject development is inconsistent with the following Chapter 3 policies of the Coastal Act:

Section 30210

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30212

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

- (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,
- (2) adequate access exists nearby [...]

Section 30221

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

As trustee for the people of the State of California, the Port is responsible for managing public tidelands in a manner that maximizes beneficial uses consistent with the public trust, including public access. The Port's certified PMP, as well as past Commission action, has consistently supported the position that new development and redevelopment of existing leaseholds must provide public shoreline access between the upland development and the waterfront.

The new restaurant facilities would be located almost entirely over water. While a 45-in. wide public walkway would be constructed around the perimeter on the first floor and a 3,711 sq. ft. public viewing deck would be constructed on a portion of the second floor, the design of the public access areas is inadequate and would deter the general public from using the public areas. Specifically, to access the public viewing deck, the public would have to first enter the restaurant building in order to access the interior stairways or elevator to the second floor viewing deck, instead of an exterior stairway directly connecting from the public promenade to the viewing deck. In addition, it appears the public viewing deck would be located directly adjacent to a concessionaire or other restaurant use; however, there is no signage proposed to indicate that the public would be able to use the deck free of charge without being a customer of the restaurant or concessionaire. In order to access the first floor public walkway, the public would have to walk through tables and chairs in an outdoor restaurant seating area, instead of an

unobstructed entrance directly connecting to the public promenade. By requiring the public to enter the restaurant building or walk through an area that is clearly used as an outdoor dining area for the restaurant, it is unlikely that the public would be aware of the public access areas or feel welcome in those areas without being a paying customer. Public access signage for the project is limited to three small signs that would be difficult to see from the promenade due to their proposed size (6 inch round sign with “PUBLIC ACCESS” printed on the top 3 inches of sign), color (bronze/black), and placement (wall-mounted on building). Thus, the design of the restaurant complex and lack of adequate signage would discourage the public’s use of the deck and perimeter walkway and raises a substantial issue.

In addition, the Port has mischaracterized the expanded dock as a public amenity. The dock is essentially private, as it will only be available to paying customers who travel by boat to dine at one of the restaurants in the complex, and the dock will remain closed to members of the general public. Therefore, the dock is not available to the general public and raises a substantial issue.

The project’s parking provisions also raise substantial issue as the lack of parking required to be provided will limit the public’s ability to park and access the waterfront. The Portside Pier project will be significantly larger than the existing restaurant (40,805 sq. ft. versus the existing 24,855 sq. ft.) with much more seating (1,000 future seats compared to 536 existing seats), but fails to adequately address necessary parking facilities. First, the Port calculated the project’s parking requirement based on the increase in area of the proposed building over existing, even though the project is not an addition, but a complete demolition and construction of a new building. Instead, the parking requirement should be calculated based on the area of the entire building, which would result in 391 parking spaces instead of the 89 spaces calculated for the project. Furthermore, it is not appropriate to use the existing parking requirement as a baseline because the existing building is pre-coastal and no on- or off-site parking was required as part of the original development.

The Transportation Impact Analysis conducted for the project states that there is an existing supply of 286 public parking spaces in the project vicinity and calculates the parking deficit based on the supply, existing demand, and the parking spaces required for the project during different times of day. The study found that there would be enough supply to meet demand during all times of a typical weekday except during noon when there would be a deficit of 10 parking spaces, and weekend afternoons where there would be a deficit of 36 spaces. The study did not show the calculations used to determine restaurant demand over different times per day; however, if the total of 391 required spaces was used (instead of 89 spaces), the deficit would likely be significantly larger and extend for longer periods throughout the day.

Near-term (2018-2020), the study found that there will be a total parking deficit of 979 spaces in the North Embarcadero study area (Exhibit 9), taking the 890 space deficiency identified in the *North Embarcadero Focused Parking Study* and adding the 89 space deficiency from the subject project. MND mitigation measure TRA-2 requires that the applicant secure 979 parking spaces for valet parking. While the parking lot operator ACE has committed to providing over 1,000 parking stalls every day for the project,

leading to the conclusion that the deficit would be addressed, it is unclear how these 1,000 parking spaces are currently being used and they would likely displace parking for other existing uses in the project vicinity. In particular, it is unclear whether the 1,000 parking stalls provided by ACE will be dedicated solely for use by the Portside Pier development or will be shared with other uses.

Finally, MND mitigation measure TRA-2 allows the parking requirement to be reduced after the initial year if the applicant submits a parking study to the Port that finds less valet parking spaces were used in the previous year. This language essentially allows the applicant to reduce the amount of parking reserved, while not requiring the applicant to take any steps to increase the amount of customers using valet parking, such as advertising or expanding the hours that valet is available.

By not addressing parking now, the Port chooses to increase dependence on the limited existing parking in the area. One parking lot located in close proximity to the subject site is Navy Pier, located over the water and originally planned to be converted into a public park in 2003. While the Port insists that it cannot yet convert Navy Pier into a park because of the lack of parking in the project area, it does not require adequate parking to be obtained by this new project, thus increasing the deficit and the continued reliance on Navy Pier to be used as waterfront parking instead of as a public park. As a result, and coupled with the large existing parking deficit in the project area, the public's ability to park and access the shoreline could be impacted and cause increased dependence on existing waterfront parking that is already being used for other waterfront uses. Therefore, this inconsistency with the certified PMP and Coastal Act policies that require improved parking programs and facilities raises a substantial issue.

Considering the noted parking deficits of the project itself and the constrained public parking in the area, the Port should have analyzed and considered a reduced-project alternative that would avoid or minimize any increase in open water coverage and reduce the parking need. However, no such alternative was analyzed. Thus, the lack of an alternatives analysis also raises a substantial issue.

F. BIOLOGICAL RESOURCES

The subject development contains a number of inconsistencies with the following Port Master Plan goals and policies:

XI. THE PORT DISTRICT WILL PROTECT, PRESERVE, AND ENHANCE NATURAL RESOURCES, INCLUDING NATURAL PLANT AND ANIMAL LIFE IN THE BAY AS A DESIRABLE AMENITY, AN ECOLOGICAL NECESSITY, AND A VALUABLE AND USABLE RESOURCE.

- Identify existing and potential assets.

- Keep apprised of the growing body of knowledge on ecological balance and interrelationships.
- Administer the natural resources so that impacts upon natural resource values remain compatible with the preservation requirements of the public trust.

The subject project will increase water coverage by 4,480 square feet due to the expansion of the building and dock. The MND includes a mitigation measure (BIO-4) that allows for design modifications such as translucent areas, to be subtracted from the mitigation required for the increase in shading. However, one of the primary impacts of increased open water coverage is reduced foraging habitat for birds. While translucent areas may be appropriate to offset shading impacts, they do not mitigate the obstruction of foraging opportunities and are not an appropriate form of mitigation for increased open water coverage. Further, increase in open water coverage is typically permitted for coastal-dependent uses only; however, only a portion of the increase in water coverage (2,805 sq. ft.) is associated with the expanded dock facility, and the remainder (1,675 sq. ft.) is associated with the expanded restaurant building and platform. Therefore, the expanded project footprint and associated open water coverage raises a substantial issue.

In addition, an up-to-date eelgrass survey was not conducted for the project, nor is a survey required by the MND or CDP prior to construction. Instead, the MND finding that no eelgrass exists in the project area relies on maps of eelgrass beds within San Diego Bay from 1999 through 2014 which may not reflect current conditions, resulting in the miscalculation of the mitigation required for the increase in shading. In order to avoid potential impacts to eelgrass, an updated survey should be conducted for the project. Thus, the lack of survey work required to identify sensitive biological resources such as eelgrass raises a substantial issue.

G. VISUAL QUALITY

The subject development contains a number of inconsistencies with the following Port Master Plan goals and policies:

II. THE PORT DISTRICT, AS TRUSTEE FOR THE PEOPLE OF THE STATE OF CALIFORNIA, WILL ADMINISTER THE TIDELANDS SO AS TO PROVIDE THE GREATEST ECONOMIC, SOCIAL, AND AESTHETIC BENEFITS TO PRESENT AND FUTURE GENERATIONS.

- Consider the entire San Diego Bay as a complete system when promoting the multi-purpose development of the Port District.

VIII. THE PORT DISTRICT WILL ENHANCE AND MAINTAIN THE BAY AND TIDELANDS AS AN ATTRACTIVE PHYSICAL AND BIOLOGICAL ENTITY.

- Each activity, development and construction should be designed to best facilitate its particular function, which function should be integrated with and related to the site and surroundings of that activity.
- Views should be enhanced through view corridors, the preservation of panoramas, accentuation of vistas, and shielding of the incongruous and inconsistent.

The project was approved with a large number and size of lighting and signage, which will distract from views of the bay and be out of character with the surrounding development. Specifically, the project includes ten backlit illuminated signs, ranging in size from 12 to 43 feet in length and approximately 3 to 13 feet in height on the waterside- and promenade-facing frontages of the building to display the names and/or logos for the four eateries, and Portside Pier complex; eight LED panels along the North Embarcadero Promenade and along the upper deck on the waterside-facing frontage of the building to display upcoming events, menu specials, and other notifications; two LED illuminated “baskets” surrounding the building; and light tube strips on the promenade-facing frontage of the building (Exhibit 1). The large number and size of individual signs and lights on the single two-story building are excessive, especially as the signage and LED panels will be advertisements seen from both land and water. Collectively, the building will emit an amount of light that is likely to distract from views of the bay. Finally, the signage and lighting would far exceed that associated with the current building and of neighboring structures and would not be in character with the surrounding development, including the Star of India, a historic ship, and the Maritime Museum of San Diego. These impacts are further exacerbated when combined with the expanded height and scale of the approved development. It would also set an adverse precedent for redevelopment of the Embarcadero. Therefore, the amount of lighting and signage approved on the building raises a substantial issue.

H. CONCLUSION

Based on the information cited above, the Port’s approval of demolition and reconstruction of an expanded restaurant complex is inconsistent with the Chapter 3 public access and recreation policies of the Coastal Act and various sections of the Port’s certified Port Master Plan relating to water use designation, public access, biological resources, and visual resources. Therefore, the Commission finds that a substantial issue exists with respect to the consistency of the Port’s action with its certified Port Master Plan and the Chapter 3 policies of the Coastal Act.

I. SUBSTANTIAL ISSUE FACTORS

The other factors that the Commission usually considers when evaluating whether a local government’s action raises a substantial issue also support a finding of substantial issue. While the extent and scope of the particular development is a restaurant complex and dock, the objections to the project suggested by the appellants, including the failure of the

Port to incorporate the project into the PMP, inadequate public access, increase in open water coverage, the lack of an alternatives analysis, and reduced visual quality, raise substantial issues. The decision creates a poor precedent with respect to the proper interpretation of the Port's PMP, as the Port should have used the PMP amendment process to change the water use designation to the appropriate designation to accommodate the expanded restaurant use. The development could also set an adverse precedent elsewhere along the bay as the amount and size of lighting and signage is significant and out of character with the surrounding development.

APPENDIX A

SUBSTANTIVE FILE DOCUMENTS: Appeal by Commission Chair Dayna Bochco dated February 21, 2017; Appeal by Commissioner Mary Shallenberger dated February 21, 2017; Certified San Diego Unified Port District Port Master Plan; Final Environmental Impact Report (EIR) for the Portside Pier Restaurant Redevelopment Project dated November 2016; Draft CDP for Application No. 2016-91

**SAN DIEGO UNIFIED PORT DISTRICT**

Real Estate Development Department

Development Services

P.O. BOX 120488

SAN DIEGO, CA 92112-0488

(619) 686-6291

COASTAL DEVELOPMENT PERMIT

Applicant: The Brigantine, Inc.
7889 Ostrow Street
San Diego, CA 92111

Project: Portside Pier Restaurant Redevelopment Project

Location: 1360 North Harbor Drive, San Diego, CA 92101

You are hereby granted a Coastal Development Permit. This permit is issued in conformance with the California Coastal Act of 1976 and the Coastal Permit Regulations of the San Diego Unified Port District, as adopted by the Board of Port Commissioners on July 1, 1980, Resolution No. 80-193, and as amended on December 2, 1980, Resolution No. 80-343, and on February 14, 1984, Resolution No. 84-62, in accordance with the provisions for the issuance of a ☐ Emergency ☒ Non-Appealable ☐ Appealable Coastal Development Permit.

Date of Board Action: December 13, 2016

Board of Port Commissioners Resolution Number: 2016 - XXX

Date of Permit: ☒

Application Number: 2016-91

Permit Number: CDP-2016-XX

The project is located between the sea (as defined in the Coastal Act) and the first inland continuous public road paralleling the sea. The project is fully consistent with Public Resources Code Sections 30604(c), 30210-30224, and the Coastal Act public access and recreation policies referenced therein and the District's Coastal Development Permit Regulations.

This permit is limited to the development described below and set forth in material on file with the San Diego Unified Port District (District), and subject to the terms, conditions, and provisions hereinafter stated:

DEVELOPMENT

The Project Applicant, The Brigantine, Inc. (referred to herein as “Permittee”), proposes to construct and operate four eating establishments/restaurants, a second-floor public viewing deck, and an expanded dock and dine facility (collectively, “Project”) at 1360 North Harbor Drive in San Diego (see Exhibits 1 through 7, incorporated herein by reference).

The project area covers approximately 45,174 square feet of land and water area, which includes approximately 37,107 square feet of water area and approximately 8,067 square feet of land area. The existing one-story, approximately 24,855-square-foot restaurant structure will be demolished and replaced with a new two-story, approximately 34,069-square-foot restaurant structure. The Brigantine proposes to redevelop the project site with four eating establishments/restaurants (three restaurants and a gelato and coffee walk-in shop) that will provide up to 1,000 restaurant seats for diners.

The redevelopment also includes a proposed approximately 3,711-square-foot dedicated public viewing deck with tables and benches for up to 108 visitors on the second story. This area will be separate from the restaurant areas and accessible from the North Embarcadero Promenade through the restaurant located at the southeast area via stairs and an elevator directly from the Promenade. The public viewing deck will not be used for private functions and will be open to the public during restaurant business hours. The ground floor of the restaurant will include a perimeter walkway approximately 45 inches wide for the public and shall enable public access along the waterside edge of the facility and provide views of the bay. The public viewing area and perimeter walkway shall be open to the public at all times during operating hours of the restaurant. Clear signage will be provided directing the public from the North Embarcadero Promenade to the public viewing deck and ground floor perimeter public walkway. For security reasons, the public areas will be open at all times during the hours of operation of the restaurants. The restaurant areas will also include open deck areas on the ground and second floors, where food and drink service is available to guests. The indoor and outdoor restaurant areas (excluding the public viewing area and perimeter walkway) will be available for private parties, wedding receptions, and other special events featuring music. Amplified music shall comply with the City of San Diego Noise Ordinance or a Port ordinance, if adopted in the future.

The portion of the North Embarcadero Promenade located in front of the restaurant site will be improved consistent with the North Embarcadero Visionary Plan (NEVP) Phase 1 and recent improvements to the south. This includes new pavers, street furniture, and wayfinding signage. No changes are proposed to the current configuration of the promenade and it will be open at all times.

Backlit illuminated signage will be mounted on both the waterside- and promenade-facing frontages of the building and will consist of light-emitting diode (LED) lighting behind acrylic letters and logos to create an illuminated effect. The signs will display the

names and/or logos for the restaurant tenants, and for Portside Pier. The illuminated signs range in size from 12 to 43 feet in length and from 3 feet 2 inches to 12 feet 11 inches in height. In addition, eight color LED panels will be installed along the North Embarcadero Promenade and along the upper deck on the waterside-facing frontage of the building to display upcoming events, menu specials, and other notifications. The LED panels will be computer operated with automatic dimming to adjust from day to night illumination. The “baskets” of the building, constructed with glass panels, will also be illuminated at night with interior LED lighting. The glass panels of the baskets will be constructed of laminated frit glass with an anticipated 65 percent light transmission and an aluminum support system. In addition, blue LED light tube strips will be included on the promenade-facing frontage of the building. On the outdoor bar of The Brigantine’s second floor, an internally illuminated sculptural centerpiece will be installed. Levels of lighting spill will be comparable to that from existing lighted facilities along the North Embarcadero Promenade, not exceeding 9.2 footcandles at the edge of the North Embarcadero Promenade or 6.3 footcandles at the edge of the first floor bayside deck, and be limited to the specifications provided in the photometric plan dated July 26, 2016, attached hereto as Exhibit 8 and incorporated herein by reference. All exterior signage and lighting and baskets shall be developed in substantial conformance with the specifications provided in the Preliminary Signage Plan dated November 28, 2016, attached hereto as Exhibit 9 and incorporated herein by reference. Any deviations from the Preliminary Signage Plan shall be approved by the District and in no event shall the signage exceed the size shown in the Preliminary Signage Plan or result in exceedance of the footcandles described above in this CDP.

The Project will construct a new building built on a new platform supported by new pilings and a new dock, entirely replacing and demolishing the existing building, pilings, platform, and dock. The Project will also include an expanded public dock and dine facility. The existing boat dock area will be increased from 565 square feet to 3,370 square feet and will allow for 4–12 vessels to dock, depending on vessel sizes. The building footprint will be larger than the footprint of the existing building, and the expansion of the two stories and decks on both levels will nearly double the total square footage of restaurant space and deck area. The overall building height will increase by up to 7 feet over the height of the existing structure, from approximately 27 to approximately 34 feet above mean sea level.

Demolition and construction of the proposed project will involve in-water work for the removal of the existing platform and supporting piles and the installation of a new platform and supporting piles. The majority of demolition work will be from barges on the water. Project demolition and construction will take approximately 11 to 16 months, and most of the work will be accomplished from the waterside using a barge and from a staging area on the North Embarcadero Promenade, temporarily displacing a portion of the promenade and parking, which will be restored to existing configurations upon completion of construction. Approximately 55 parking spaces will be temporarily closed and pedestrian traffic will be rerouted from the North Embarcadero Promenade in front of the Project site through the closed parking area, separated by K-Rail and other physical barriers from North Harbor Drive for the duration of construction.

In order to adapt to rising sea levels, the project will use materials to withstand sea level rise impacts and design components such that they can be retrofitted or adapted prior to high tides and waves reaching the base of the structure as a consequence of sea level rise, in the event sea level rises above the floor level of the proposed structure.

Table 1 below provides a summary comparison of the proposed project components with those of the existing facility. As shown, the project will cover approximately 28,330 square feet of water. The building footprint will be approximately 34,069 square feet, two stories with decks on both levels and the building height will be approximately 34-feet above mean sea level. In addition, the boat dock area will be approximately 3,370 square feet and allow for 4–12 vessels to dock, depending on vessel sizes.

Table 1: Existing and Proposed Project Features Comparison			
Project Component	Existing	Proposed	Change
Building Floor Area ¹	24,855 square feet	34,069 square feet	9,214 square feet
Building Gross Water Coverage	23,285 square feet	24,960 square feet	1,675 square feet
Public Dock Area* ²	565 square feet ¹	3,370 square feet	2,805 square feet
First Floor Public Access Area*	819 square feet	1,913 square feet	1,094 square feet
Total Water Coverage*	23,850 square feet	28,330 square feet	4,480 square feet
Total Land Coverage (Promenade Improvement Area)	8,067 square feet	8,067 square feet	0 square feet
Restaurant Seats	536	1,000	464
Boat Slips	2	12	10
Public Viewing Deck Seats	0	108	108
Second Floor Public Deck ¹	0 square feet	3,711 square feet	3,711 square feet
Building Height	27 feet	34 feet	7 feet
Employees (daily)	60	90	30
On-site Parking	0	0	0
Visitors per day (estimated average)	1,100	2,220	1,120
*Indicates over-water components			
¹ The change in floor area and public deck area from the Draft MND to the Final MND was achieved by rearranging the layout of the building and expanding the kitchen and deck into previously unutilized space. The overall building footprint and water coverage did not change.			
² The existing boat dock was destroyed by storm and wave activity in January 2016 and has not been replaced because of the prospective redevelopment.			

A. Demolition

Demolition will involve the complete removal of:

- The existing 24,855-square-foot building
- The existing 23,285-square-foot platform
- The existing 66 pre-stressed 16-inch diameter concrete support piles
- The remnants of the existing 565-square-foot dock

Demolition work will be completed entirely from two barges. One barge will hold a crane and other demolition equipment and the other used to haul the debris to the Tenth Avenue Marine Terminal for unloading and transport to a recycling center or landfill. Demolition hours will be from 7:00 A.M. to 7:00 P.M. Monday through Saturday for up to four months. During the demolition timeframe, removal of existing piles will take approximately two to three weeks. A daily peak of approximately 12 workers will work from the barges during the demolition phase. Construction workers for the demolition phase will park remotely at the demolition contractor's facilities and travel to the project site by boat from the Tenth Avenue Marine Terminal. Exhibit 4 shows the location of existing piles to be removed. The piles located along the Embarcadero Promenade in front of the restaurant site will remain.

B. Construction

The proposed project will involve construction of the following:

- No more than 53 new pre-stressed up to 24-inch diameter concrete piles (13 fewer than currently exist. Exhibit 4 shows the location of proposed new piles.)
- A new approximately 24,960-square-foot platform over the water
- A new approximately 34,069-square-foot restaurant building with the following features:
 - a restaurant on the north side
 - a restaurant on the south side
 - a fast-casual brew pub
 - gelato & coffee
- A new approximately 3,711-square-foot second floor public viewing deck
- An approximately 1,913-square-foot public access perimeter walkway around the waterside edge of the ground floor
- A new dock and dine approximately 3,370-square-foot dock

The existing utility connections at the project site will be used and may require in-kind replacement due to disrepair.

Project construction will take approximately one year and the work accomplished from the waterside using a barge and from the landside using a staging area in the parking area and promenade adjacent to the proposed restaurant facility. Construction of the new platform and restaurant building will be from 7:00 A.M. to 7:00 P.M. Monday through Saturday, except for City Holidays, in compliance with San Diego Municipal Code Section 59.5.0404. The staging area will temporarily displace existing sidewalk and parking in front of the project site along the North Embarcadero Promenade (approximately 55 spaces). During construction a K-Rail or similar safety barrier will be erected to provide continued pedestrian access along the waterfront around the construction area (Exhibit 7). A peak daily total of approximately 130 construction workers will be needed during project construction. Construction workers will park remotely in existing public parking lots and walk or be shuttled to the project site. Work trucks and materials will be staged along the North Embarcadero Promenade within a fenced and signed construction area that will be closed to the public. Piles will be driven

first (1–2 months) followed by construction of the platform deck/surface (1–2 months) and once complete, the construction of the building upon the deck and the dock will commence (6–8 months).

Upon completion of construction of the restaurant building, all areas not within the project's proposed lease boundary will be restored to existing configurations, specifically promenade and parking. This consists of repaving the promenade areas disrupted by construction activities, and resurfacing and restriping the parking areas disrupted by construction activities.

C. Operation

The project will result in a total of 1,000 seats for restaurant patronage and a gelato and coffee bar, as well as a dedicated public viewing deck. All parking and promenade amenities will be restored to the existing dimensions and configuration, although with aesthetic treatments intended to be consistent with the public improvements included in the NEVP Phase 1. As with the existing restaurants, no dedicated parking will be provided. Metered public parking is available along the North Embarcadero Promenade, and a number of public parking lots are available within walking distance of the project site. The dock and dine will have a controlled access to protect boats/boaters property and will accommodate up to 12 vessels at a time. The public viewing deck will be available at all times the restaurants are open, and accessible via stairs through the south end restaurant and elevator directly from the promenade that will be clearly signed from the promenade. Occupancy of the viewing deck will be available for up to 108 people with seating and tables provided. Upon completion, the proposed project will generate approximately 250 permanent jobs.

STANDARD PROVISIONS

1. Permittee shall adhere strictly to the current plans for the Project as approved by the District and the Development, as described above and the Project described in the Final Mitigated Negative Declaration (UPD #MND-2016-91; SCH 2016081007, Clerk Document No. XXXXX), dated November 2016, and adopted by Resolution No. 2016-xxx on December 13, 2016, for the Project.
2. Permittee shall notify the District of any changes in the Project and herein described. Notification shall be in writing and be delivered promptly to the District. District approval of the project change may be required prior to implementation of any multi-
3. Permittee and the Project shall meet all applicable codes, statutes, ordinances and regulations, and Permittee shall obtain all necessary permits from local, regional, state, and federal agencies.
4. Permittee shall conform to, and this permit is subject to, the permit rules and regulations of the District, including, but not limited to, the District's Coastal Development Permit Regulations.

5. Permittee shall be responsible for compliance with ADA and Title 24 specifications.
6. Permittee shall commence development within two (2) years following the date of the permit issuance by the District. Construction shall be pursued in a diligent manner and completed within a reasonable period of time.
7. The permit is in no way intended to affect the rights and obligations heretofore existing under private agreements nor to affect the existing regulations of other public bodies.
8. This permit shall not be valid unless two copies have been returned to the Real Estate Development Department of the District, upon which copies the Permittee has signed a statement agreeing that the Permittee will abide by the terms, conditions, limitations, and provisions of the permit.
9. The Permittee and contractor shall perform all best management practices (BMPs) during construction and maintenance operations. This includes no pollutants in the discharges to storm drains or to Pacific Ocean, to the maximum extent practicable.
10. All District tidelands are regulated under Regional Water Quality Control Board Order No. R9-2013-0001, National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0109226, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego Region (Municipal Permit). The Municipal Permit prohibits any activities that could degrade stormwater quality.

The Permittee shall ensure that post-construction / operational use of this Project site complies with the Municipal Permit and District direction related to permitted activities including the requirements found in the District's Jurisdictional Runoff Management Program (JRMP). The JRMP is available on the District website: <https://www.portofsandiego.org/environment/clean-water.html> or by contacting the Planning and Green Port Department, (619) 686-6254.

11. This project may be subject to the District post-construction BMP requirements. If so, approval of the project by the District is necessarily conditioned upon submission by the Permittee of a project specific Stormwater Quality Management Plan (SWQMP) that meets District requirements and is compliant with the District BMP Design Manual (JRMP Appendix D). The Permittee shall implement all post-construction structural and non-structural BMPs throughout the life of the project.

The implementation and maintenance of the post-construction BMPs constitute regulatory obligations for the Permittee, and failure to comply with the Municipal Permit, the JRMP, or the District approved SWQMP, including the specific BMPs contained therein, may be considered a violation of the permit and a violation of District Code.

12. In the discretion of the District, prior to commencement of construction, Permittee may be required to require that their contractor(s) furnish security, naming the District as a dual obligee, in the form of a performance bond and a payment bond, each in an amount deemed appropriate by the District to guarantee payment of the subcontractors, completion of the approved work under this permit, and compliance with the conditions and limitations upon which such permit is granted. Prior to commencement of construction, Permittee may also be required by the District to furnish security in the form of a payment bond in an amount deemed appropriate by the District to guarantee payment to the contractor(s) for work performed under this permit.
13. By accepting this permit, Permittee acknowledges and agrees (a) that the project site may be subject to environmental conditions and hazards; (b) to assume the risks to the Permittee of injury and damage from such conditions in connection with the implementation of the project; (c) to unconditionally waive any claim of damage or liability against the District, its Board of Port Commissioners, officers, agents and employees ("District" for purposes of this condition) for injury or damage from such conditions to persons performing the work for which this permit is issued; (d) to defend, indemnify and hold harmless, and require that Permittee's contractor(s) engaged to perform the work on the project defend, indemnify and hold harmless, the District from any claim, demand, liability, loss, action, damage, cost, expense (including all attorneys' fees and consultant/expert fees), award, fine, penalty or judgment arising out of, resulting from, or in any way related to the performance of the work by Permittee's contractor(s) for which this permit is issued, with the exception of any claim, action, damages, liability or costs arising or resulting from the project caused by the gross negligence or willful misconduct of the District; (e) to defend, indemnify and hold harmless the District from any claim, demand, liability, loss, action, damage, cost, expense (including all attorneys' fees and consultant/expert fees), award, fine, penalty or judgment arising out of, resulting from, or in any way related to the District's approval of the project, the granting of this permit, and the District's adoption of the Final Mitigated Negative Declaration; and (f) that Permittee will require Permittee's contractors to name the District as an additional insured on all policies of insurance, now in existence or to be obtained by them, for the work conducted pursuant to this permit.
14. Permittee acknowledges and agrees that: (a) it is the sole and exclusive responsibility of Permittee, and not the District, to ensure that all persons and/or entities who provide any labor, services and/or equipment in connection with the project, shall comply with the requirements of California's prevailing wage laws (the "PWL"), to the extent such laws are applicable; and (b) it is the sole and exclusive responsibility of Permittee, and not the District, to determine whether the project is subject to the PWL by obtaining a determination by means that do not involve the District. If the project is determined to be subject to the PWL, Permittee shall comply with all applicable provisions of the PWL, and shall take reasonable steps to ensure that all persons and/or entities who provide any labor, services, equipment

and/or materials in connection with the project shall likewise comply with all applicable provisions of the PWL.

Permittee further acknowledges and agrees that Permittee's failure to comply with all applicable provisions of the PWL, and/or their failure to take reasonable steps to ensure that all persons and/or entities who provide any labor, services, equipment and/or materials in connection with the project comply with all applicable provisions of the PWL, shall render Permittee, and not the District, liable for all remedies (inclusive of all applicable fines and penalties), afforded by law as a consequence of such non-compliance. Permittee expressly agrees to defend, indemnify and hold harmless the District, from any claim, demand, liability, loss, action, damage, cost, expense (including all attorneys' fees and consultant/expert fees), award, fine, penalty or judgment arising out of, resulting from, or in any way related to the PWL (collectively "PWL Claim") made against or incurred by the District in any capacity (including, without limitation, as a real party in interest), except for any PWL Claim arising out of the sole negligence or willful misconduct of the District.

15. The conditions of this permit are independent of, and in addition to, the obligations of the Permittee under any existing lease(s), Tidelands Use and Occupancy Permit(s), or other contractual agreement(s) with the District, and are binding upon Permittee and its agents, representatives, successors and permitted assigns.

SHORT TERM CONSTRUCTION MEASURES

1. To minimize noise during construction, the Permittee will require the construction contractor to (a) restrict normal construction activities from 7:00 am to 7:00 pm; (b) keep construction equipment as far as possible from sensitive receptors; and (c) provide acoustical shielding around equipment operating at night, from 10:00 pm to 7:00 am.
2. To minimize nuisance effects from lights or glare during construction, the Permittee will require the construction contractor to shield and direct night lighting away from adjacent areas.
3. All construction equipment shall be maintained in peak condition to reduce operational emissions.
4. Diesel equipment shall use low-sulfur diesel fuel.
5. Electric equipment shall be used to the maximum extent feasible during construction.
6. The Permittee shall require the construction contractor to provide construction employees with transit and ride share information.

7. The Permittee shall ensure that any site contamination is identified and a site restoration plan, acceptable to the appropriate regulatory agencies, is prepared and implemented to reduce any existing contamination to a level that has no potential to threaten employee or human health as defined under existing regulations. If any potential exists for impacts to employee health from exposure to hazardous materials, workers shall be provided with adequate protective gear.
8. The Permittee shall require all employees that are exposed to noise levels in excess of Occupational Safety and Health Administration hearing protection thresholds, during construction or operation, to wear noise protection devices (ear plugs and covers) that are protective of individual hearing.
9. Permittee and/or contractor shall comply with State Water Resources Control Board Order No. 2009-0009-DWQ (NPDES General Permit No. CAS000002), and Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity (commonly known as the "Construction General Permit"), as adopted, amended, and/or modified. Construction activity subject to the Construction General Permit requires development and implementation of a Storm Water Pollution Prevention Plan (SWPPP). The Permittee and/or contractor are responsible for submitting to the District a SWPPP that is compliant with the Construction General Permit and District required minimum BMPs. The District requires the use of District SWPPP templates. Once approved, the SWPPP document shall be maintained on the construction site at all times and made available for review by the District or other regulatory agencies.

The Permittee and/or contractor is responsible for ensuring that the SWPPP document is maintained on the site, implemented, and amended as required throughout construction. No discharges of any material or waste, including potable water, wash water, dust, soil, trash, and debris, may contaminate stormwater or enter the stormwater conveyance system. Any such material that inadvertently contaminates stormwater or enters the stormwater conveyance system as part of site operations shall be removed immediately. All unauthorized discharges to the stormwater conveyance system or the Bay or the ocean shall be reported immediately to the District Planning and Green Port Department, in order to address any regulatory permit requirements regarding spill notifications.

A project's total disturbed soil area (DSA) shall not exceed 5 acres during the rainy season (October 1 - April 30) and 17 acres during the non-rainy season (May 1 - September 30). The District may temporarily increase these limits if the individual site is in compliance with applicable stormwater regulations and the site has adequate control practices implemented to prevent stormwater pollution.

SPECIAL PROVISIONS

1. Permittee shall comply with all applicable Mitigation Monitoring and Reporting Program requirements, as described in the "Portside Pier Restaurant

Redevelopment Project” Final Mitigated Negative Declaration (UPD #MND-2016-91; SCH 2016081007, Clerk Document No. XXXXX), dated November 2016, and adopted by Resolution No. 2016-xxx on December 13, 2016, attached hereto as Exhibit 10 and incorporated herein by reference.

2. Permittee shall implement all resurfacing, paving, and striping necessary to return promenade and parking amenities affected during construction activities to conditions suitable for public use.
3. Permittee shall implement the following Sustainability features:
 - (1) Building
 - a. High-efficiency, clear, non-reflective Low E glass;
 - b. Light-colored roofing materials will be used to reduce heat buildup in the building and reduce the heat island effect;
 - c. Photovoltaics located on the bay-facing side of the rooftop;
 - d. It is anticipated that the proposed project will exceed the minimum energy efficiency standards dictated by the California Title 24 Building Code requirements;
 - e. Ducts within the proposed building will be sealed during construction and cleaned out during commissioning to promote indoor air quality by minimizing dust and mold accumulation;
 - f. Hardscape, roofing, and deck materials will include light-colored paving to reduce heat island effect;
 - g. Water fixtures, including toilets, sinks, and kitchen equipment within the proposed building, will be low-flow and will reduce water use.
 - (2) Materials & Resources
 - a. Adhesives, sealants, and paints will conform to the guidelines for low- and no-volatile organic compound (VOC) products;
 - b. Carpets will conform to the product requirements for the Carpet and Rug Institute Green Label program;
 - c. During demolition, materials will be separated and recycled. During construction, solid waste will be recycled;
 - d. Use of reclaimed wood for exterior façade elements;
 - e. The proposed project will use recycled materials and materials that are produced in the Southern California area for construction.

(3) Mechanical Systems

- a. A variable-flow primary chilled-water loop will be incorporated in the proposed building, which will reduce cooling energy use;
- b. Larger mechanical and plumbing equipment, such as pumps, air handlers, exhaust fans, and kitchen hoods, will use variable-speed drives, which reduce energy use to the minimum amount required to satisfy the immediate demand.

(4) Lighting

- a. The proposed project will implement a lighting design that includes the following features:
 - Incorporation of automatic lighting management controls to save energy;
 - Use of a daylight-harvesting system that senses the amount of incoming daylight and reduces the electrical lighting accordingly;
 - Installation of occupancy sensors in offices and restrooms to turn off lights in unoccupied spaces;
 - Individual light-dimming controls throughout;
 - Use of LED lighting for signage and illuminated features;
 - Use of high-efficiency, shielded lighting for all nighttime lighting fixtures.

(5) Landscape and Water Quality

- a. Landscape design will specify low-water-use plants and drip irrigation to reduce water usage;
- b. Landscape design will be designed to minimize irrigation and runoff, and to promote surface infiltration where appropriate;
- c. Plants that are tolerant of saturated soil conditions will be used where landscaped area retain or detain storm water;
- d. Landscape irrigation control will be employed to allow for shutoff after a rain event to prevent irrigation after precipitation.

Exhibits:

1. Project Location Map
2. Ground Floor Plan
3. Second Floor Plan
4. Existing and Proposed Piles
5. Proposed Renderings
 - a. Perspective from Southwest (Water)
 - b. Perspective from Southeast (Elevated)
 - c. Perspective from Northeast Promenade (Nighttime)
6. Dock and Dine Layout
7. Project Construction Area

8. Photometric Plan
9. Preliminary Signage Plan
10. Mitigation, Monitoring, and Reporting Program (MMRP) for the Portside Pier Restaurant Redevelopment Project

If you have any questions on this permit, please contact the Real Estate Development Department-Development Services of the San Diego Unified Port District at (619) 686-6291.

RANDA CONIGLIO
President/Chief Executive Officer

By: _____
Wileen C. Manaois
Principal, Development Services
Real Estate Development Department

I have read and understand the terms, conditions, limitations, and provisions of this permit and agree to abide by them.

Signature of Permittee
Mike Morton Jr.
President & CEO, The Brigantine, Inc.

Date

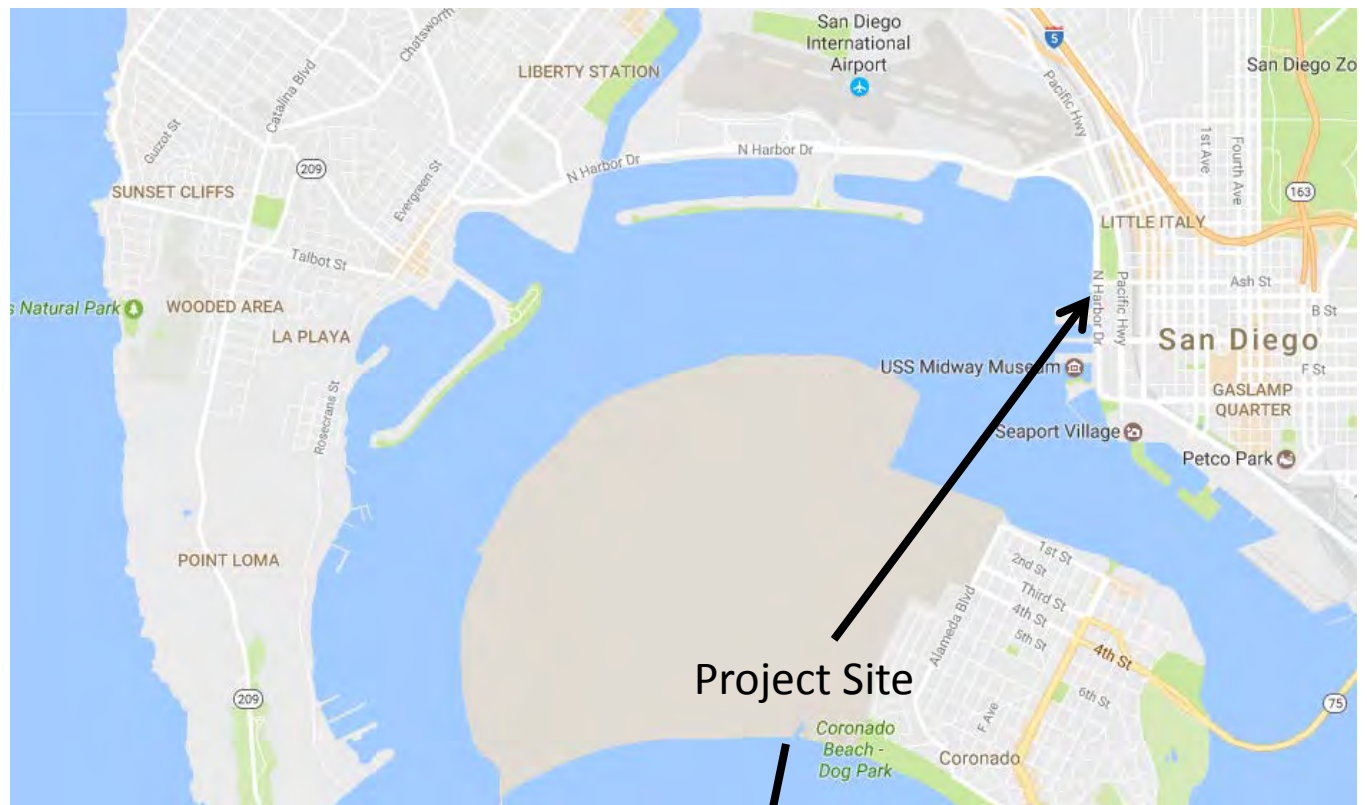


EXHIBIT NO. 2

A-6-PSD-17-0003

Location Map



California Coastal Commission



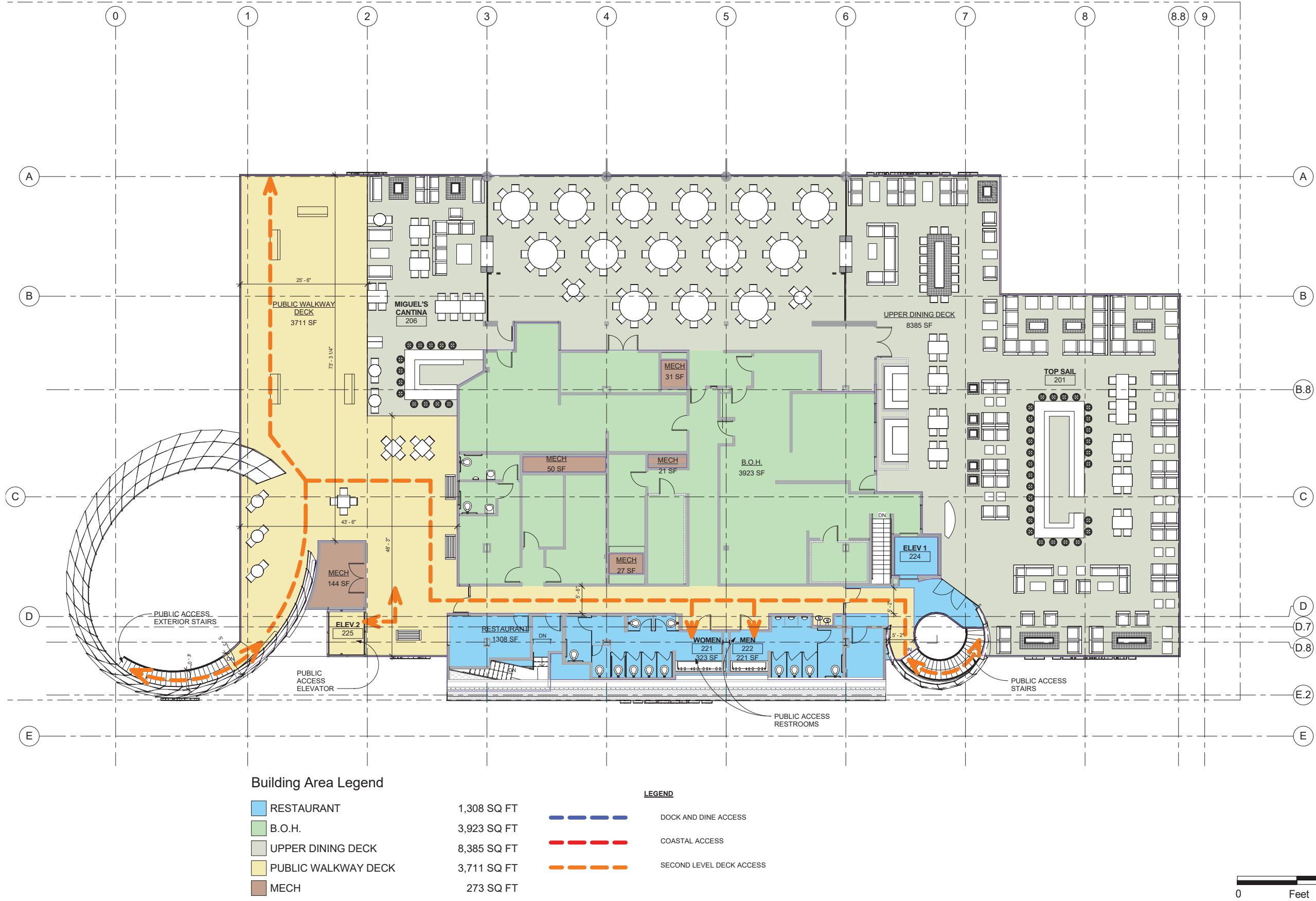


FIGURE 4b
Portside Pier Floor Plans (Second Floor)
Revised Version



TUCKER
SADLER
1620 FIFTH AVENUE SUITE 200
SAN DIEGO, CALIFORNIA 92101
619.236.1662 FAX 619.236.9267

NOT FOR
CONSTRUCTION

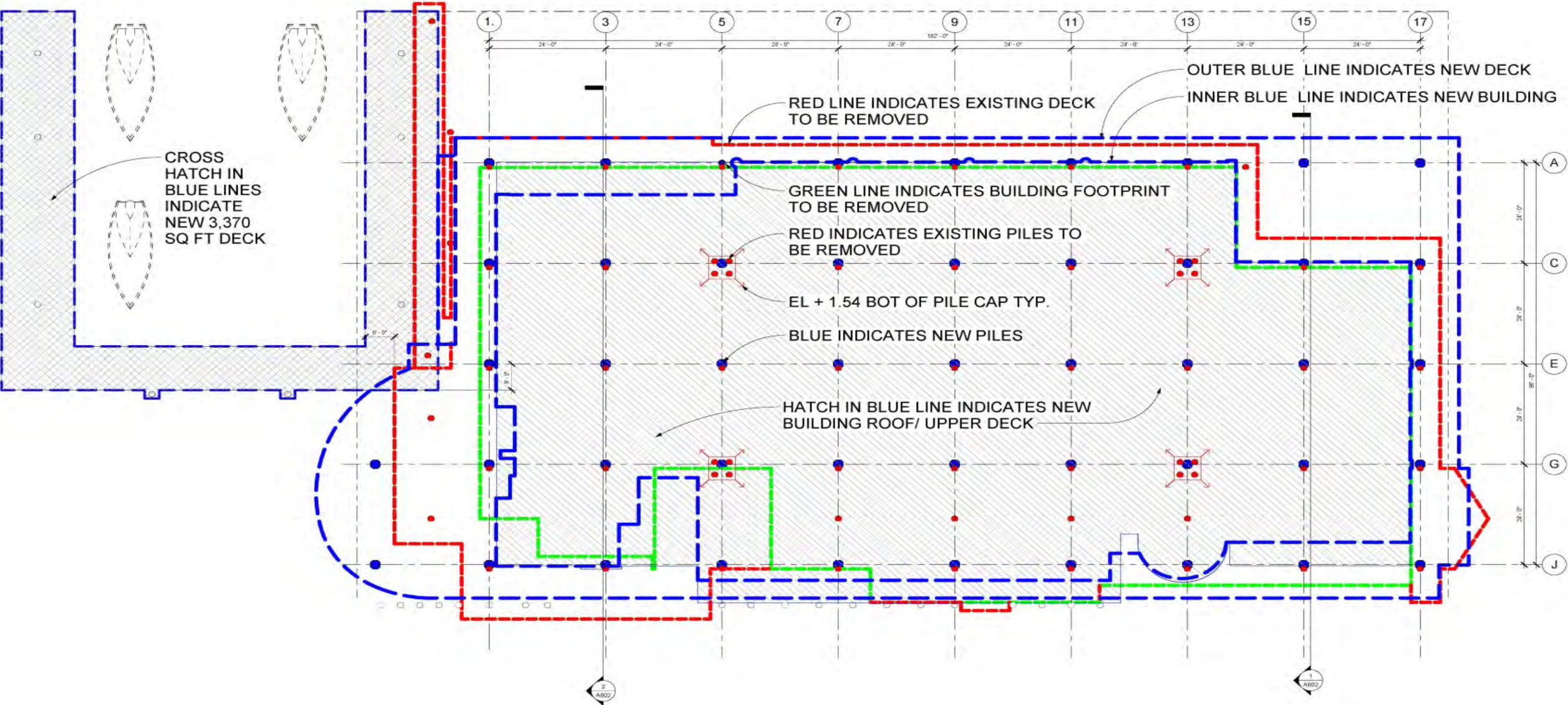
Design
Development

PORTSIDE PIER

No.	Issued / Revisions	Date

ARCHITECT OF RECORD:

PROJECT # 21511.00	DRAWN BY: MV
DATE ISSUED: 12/01/16	CHECKED BY: MV
DRAWING NUMBER DWG OF	DRAWING A200



LEGEND

- NEW 24" OCTAGON PILES
- EXISTING 16" PILES TO BE REMOVED
- EXISTING EMBARCADERO PILES TO REMAIN

PILE COUNT

EXISTING PILE COUNT	=	60	NEW PILE COUNT	=	45
EXISTING AT DOCK	=	6	NEW PILES AT NEW SLIP	=	8
EXISTING ALONG EMBARCADERO (TO REMAIN)	=	21			



BATTERED PILE

1 SITE PLAN
1" = 10'-0"



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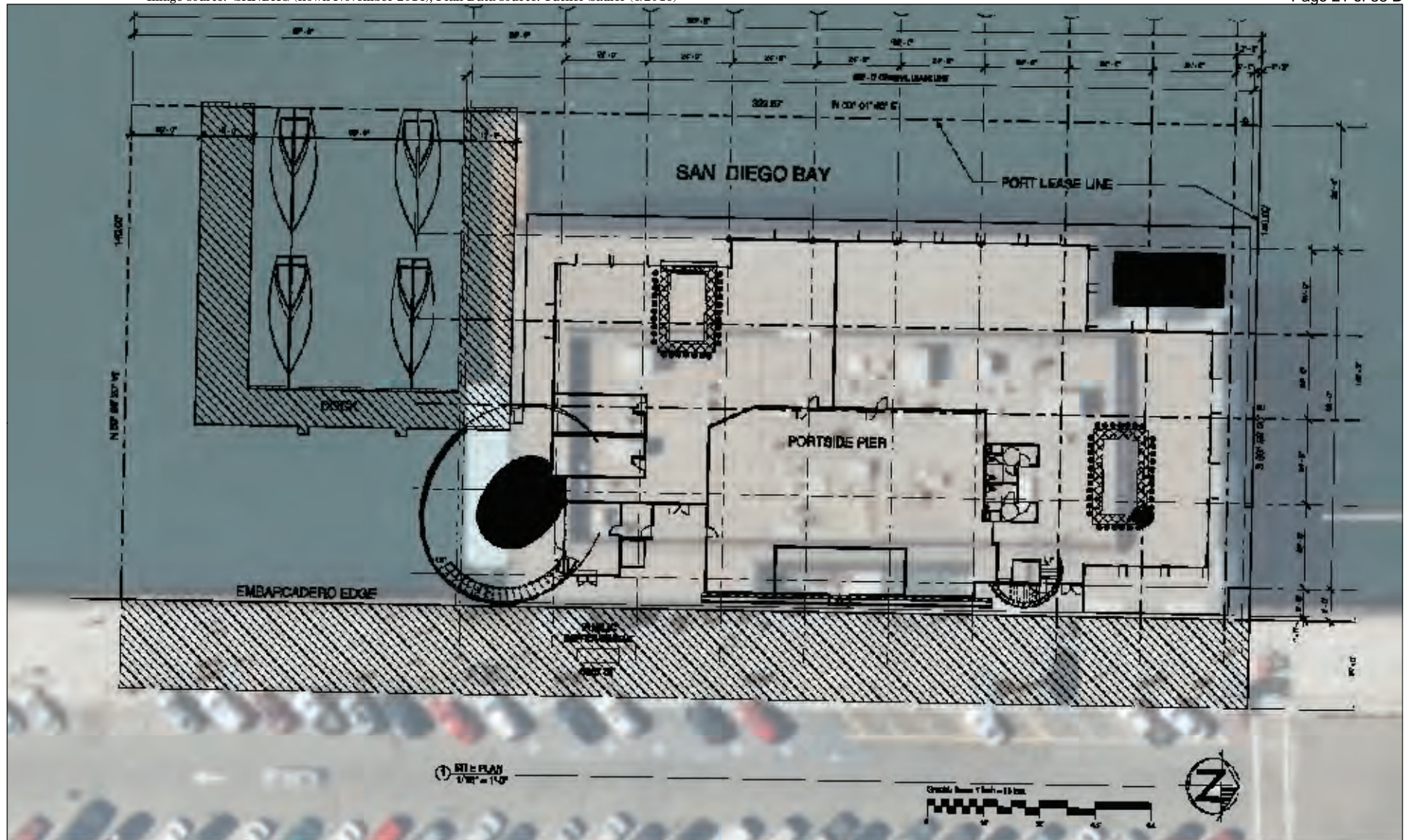
FIGURE 5a
Architectural Renderings: Perspective from Southwest (Water)
Revised Version



FIGURE 5b
Architectural Renderings Perspective from Southeast (Elevated)
Revised Version



FIGURE 5D
Architectural Renderings: Perspective from Northeast Promenade (Nighttime)
Revised Version



0 Feet 40

FIGURE 7
Dock and Dine Layout

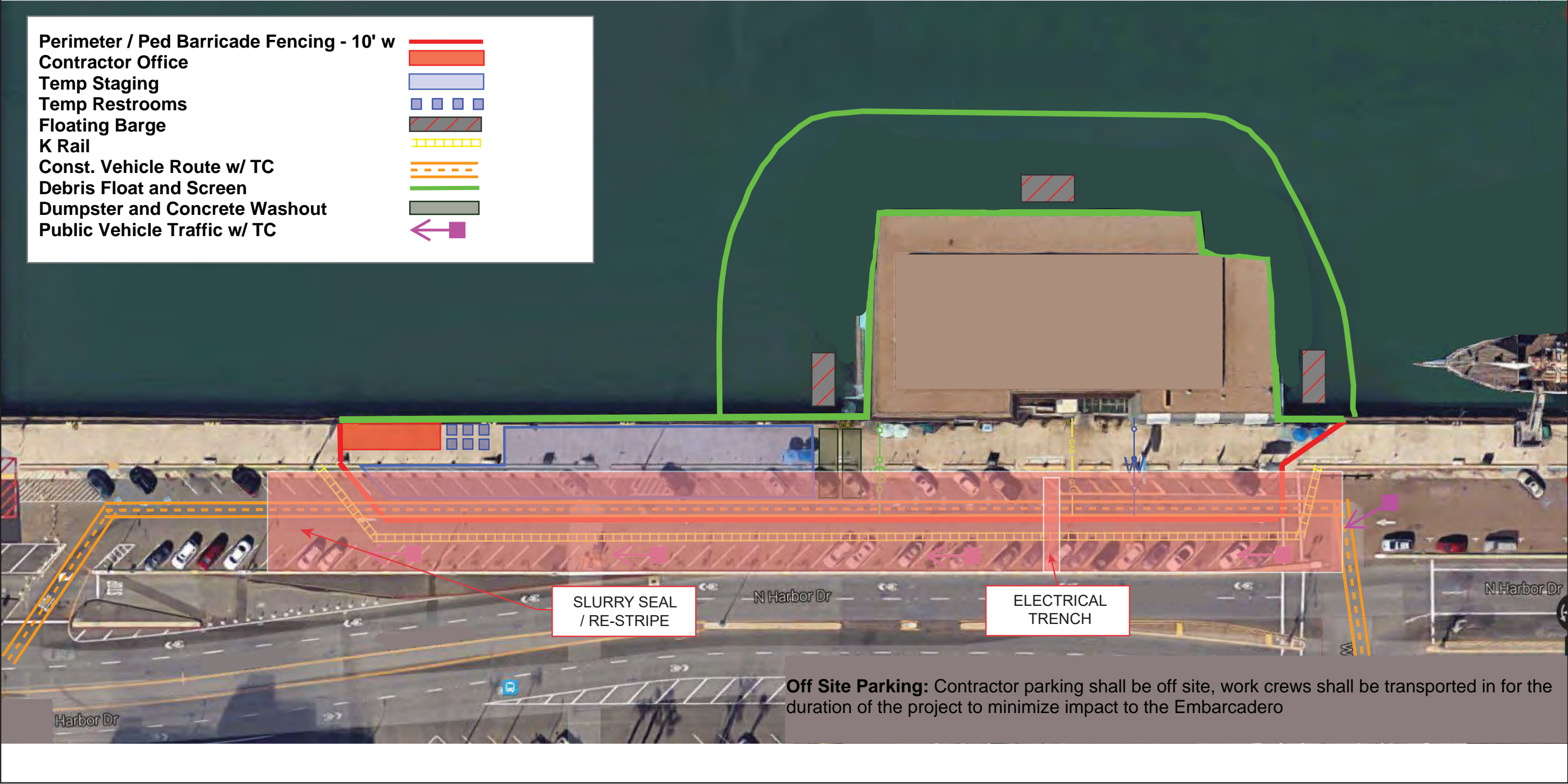


FIGURE 8
Project Construction Area



Design Development

ROBISON
ENGINEERING, INC.
19401 40TH AVE., SUITE 302
LYNNWOOD, WA 98036
206-364-3343 TEL. / 425-835-0098 FAX

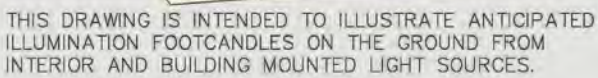
PROGRESS SET

[illegible]

ENGINEER OF RECORD:



DRAWING
E100



EXTERIOR PHOTOMETRIC
SCALE: 1/8" = 1'-0"

NOTE: STUDY DOES NOT INCLUDE OTHER ADDITIONAL STREET AND SITE LIGHTING SURROUNDING BUILDING

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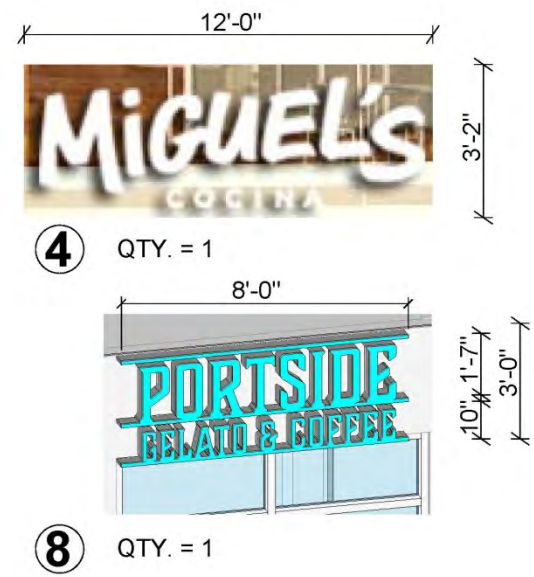


1620 FIFTH AVENUE SUITE 200
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619.236.1662 FAX 619.236.9267

PORTSIDE PIER
PRELIMINARY SIGNAGE[illegible]

ARCHITECT OF RECORD:

PROJECT # 21511.00	DRAWN BY: BA
DATE ISSUED: 11/28/16	CHECKED BY: DM,GM
DRAWING NUMBER DWG OF	DRAWING EXHIBIT A



④ 2 5 7

SIGNAGE TYPE : FRONT LIT CHANNEL LETTERS

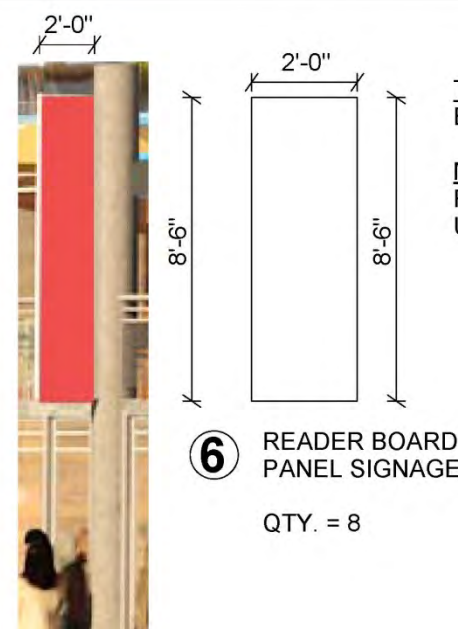
SIGNAGE LIGHTING : LED BEHIND ACRYLIC FACE

MATERIALS : 1. PRE-FINISHED ALUMINIUM RETURN
2. ALUMINIUM BACKS
3. ACRYLIC TRANSLUCENT FACE
3. ALL U.L. LISTED

① ③

SIGNAGE TYPE : FRONT/BACK LIT CHANNEL LETTERS/LOGO

SIGNAGE LIGHTING : LED BEHIND ACRYLIC FACE



TYPE : FULL COLOR LED DISPLAY
BANNER SIGNS

MATERIALS : POLYCARBONATE
FACE AUTOMATIC DIMMING
U.L. LISTED

6 READER BOARD
PANEL SIGNAGE

QTY. = 8

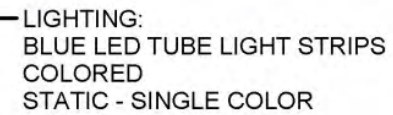


PORTSIDE PIER
EXTERNAL LIGHTING

ARCHITECT OF RECORD:

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DRAWING NUMBER DWG OF	DRAWING EXHIBIT B

PROPOSED PHOTOVOLTAIC PANELS ALONG
BACKSIDE ROOF PORTION



—INTERIOR ILLUMINATED "BASKET"
STATIC - GENERAL INTERIOR LED LIGHTING

— BASKET 1:
LAMINATED GLASS - 65% FRIT
VISIBLE LIGHT TRANSMITTANCE GLAZED PANELS

INTERIOR ILLUMINATED LOWER LEVEL
RESTAURANT

— INTERIOR ILLUMINATED "BASKET"
STATIC - GENERAL INTERIOR LED LIGHTING
STAIRS & ELEVATORS

BASKET 2:
LAMINATED GLASS - 65% FRIT
VISIBLE LIGHT TRANSMITTANCE GLAZED PANELS

— INTERNALLY ILLUMINATED
SCULPTURAL CENTERPIECE FOR
LOWER & UPPER LEVEL BAR AREAS

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CDP Exhibit 9



SEE EXHIBIT
'A' FOR
SIGNAGE
REFERENCE



TUCKER
SADLER

1620 FIFTH AVENUE SUITE 200
SAN DIEGO, CALIFORNIA 92101
619.236.1662 FAX 619.236.9267

PORTSIDE PIER
PRELIMINARY SIGNAGE

No.	Issued / Revisions	Date

ARCHITECT OF RECORD:

PROJECT # 21511.00	DRAWN BY: BA
DATE ISSUED: 11/28/16	CHECKED BY: DM,GM
DRAWING NUMBER DWG OF	DRAWING EXHIBIT C

I. MITIGATION MONITORING AND REPORTING PROGRAM

A. Purpose

This Mitigation Monitoring and Reporting Program (MMRP) was prepared for the proposed Portside Pier Restaurant Redevelopment Project (project) to comply with Section 15097 of the California Environmental Quality Act (CEQA) and Public Resources Code Section 21081.6. Public Resources Code Section 21081.6 requires the Lead Agency for each project subject to CEQA to adopt a reporting or monitoring program for changes made to the project or conditions of approval adopted in order to mitigate or avoid significant effects on the environment. The Lead Agency must also monitor performance of the mitigation measure included in any environmental document to ensure that implementation takes place. The Lead Agency is responsible for review of all monitoring reports, enforcement actions, and document disposition. The Lead Agency will rely on information provided by a monitor as accurate and up to date and will field check mitigation measure status as required.

The purpose of the MMRP is to ensure that the mitigation measures, required by the Mitigated Negative Declaration (MND), are properly implemented. As the Lead Agency for the project under CEQA, the San Diego Unified Port District (District) will monitor the mitigation measures for construction and operation of the project. The District may modify how it will implement a mitigation measure, as long as the alternative means of implementing the mitigation still achieves the same or greater impact reduction. An effective reporting system shall be established prior to any monitoring efforts. Copies of the measures shall be distributed to the participants of the mitigation monitoring measures adopted.

B. Mitigation Monitoring Checklist

The Mitigation Monitoring Checklist (Table MMRP-1) provides a mechanism for monitoring the mitigation measures in compliance with the MND. The Mitigation Monitoring Checklist is organized by categories of environmental impacts (e.g., Biological Resources, Hazards and Hazardous Materials, and Transportation/Traffic (Parking)). Potential impacts identified in the MND are summarized for each impact area and the required mitigation measures are listed. The checklist identifies the implementation schedule, who is responsible for implementing the measure, and required monitoring and reporting frequency, and who is responsible for verification of implementation. A description of these items is provided below.

Mitigation Measure.

The specific mitigation measure language as described in the MND is listed in this category.

Monitoring Requirement

Specific requirements are provided for use by District staff to ensure that measures are appropriately implemented.

Responsible Party for Mitigation Implementation

This column explains who will ensure that the mitigation measures are properly implemented. The District shall be responsible for either monitoring each measure, or delegating an agency or party, at their discretion.

Completion Requirement

The mitigation measures required for the project will be implemented at various times as construction proceeds and during operation. Some measures must be implemented before or during construction activities, while others must be implemented upon completion and during operation.

Agency Responsible for Verification

This column describes who will be ultimately responsible for ensuring that each mitigation measure is monitoring and who will coordinate the final reporting program.

Table MMRP-1 Portside Pier Restaurant Redevelopment Project Mitigated Negative Declaration Mitigation Monitoring and Reporting Program				
Mitigation Measure	Monitoring Requirement	Responsible for Mitigation Implementation	Completion Requirement	Agency Responsible for Verification
Biological Resources				
BIO-1: If pile removal and driving occur between April 1 and September 15, the contractor shall deploy a turbidity curtain around the pile removal and driving areas to restrict the surface visible turbidity plume to the area of removal and driving. It shall consist of a hanging weighted curtain with a surface float line and shall extend from the surface to 15 feet down into the water column. This measure is intended to minimize the area of the bay in which visibility of prey is obstructed. The applicant shall ensure that this measure is implemented for the duration of the pile-removal or pile-driving activity.	Construction	Applicant	During pile driving	Port District
BIO-2: Should vibratory pile-removal or impact hammer pile-driving activities be conducted between April 1 and September 15, a qualified biological monitor shall be retained by the contractor at its expense to conduct California least tern monitoring during the tern breeding season within 500 feet of construction activities. The monitor shall be empowered to delay work commencement and shall do so if terns are actively foraging (e.g., searching and diving) within the work area. Should adverse impacts to terns occur (e.g., agitation or startling during foraging activities), the biological monitor shall be empowered to delay or halt construction and shall do so until least terns have left the project area.	Construction	Applicant	During pile driving within the California least tern breeding season District shall maintain monitoring reports in project files	Port District

Table MMRP-1 Portside Pier Restaurant Redevelopment Project Mitigated Negative Declaration Mitigation Monitoring and Reporting Program				
Mitigation Measure	Monitoring Requirement	Responsible for Mitigation Implementation	Completion Requirement	Agency Responsible for Verification
BIO-3: A biological observer or observers shall monitor pile removal, if using a vibratory hammer, and pile driving, if using a vibratory or impact hammer, with the authority to stop work if a green sea turtle or marine mammal approaches or enters the shutdown zones (500 meters for vibratory removal or driving and 317 meters [117 meters plus a 200-meter buffer] for impact driving). The additional buffer is required because a marine mammal or green sea turtle spends much of its time underwater. A buffer gives the observer time to observe the animal before it dives, and allows them to stop construction before it enters the shutdown zone. Prior to the start of pile-removal or pile-driving activities, the biological observers shall monitor the shutdown zones for at least 15 minutes to ensure that green sea turtles and marine mammals are not present. If a green sea turtle or marine mammal approaches or enters the shutdown zone during the pile-removal or driving activities, the biological observer(s) shall notify the construction contractor to stop the activity. The pile-removal or pile-driving activities shall be stopped and delayed until either the biological observer(s) visually confirm that the animal has left the shutdown zone of its own volition, or 15 minutes have passed without re-detection of the animal. If the on-site biological observer(s) determine that	Construction	Applicant	During pile driving District shall maintain monitoring reports in project files	Port District

Table MMRP-1
Portside Pier Restaurant Redevelopment Project
Mitigated Negative Declaration Mitigation Monitoring and Reporting Program

Mitigation Measure	Monitoring Requirement	Responsible for Mitigation Implementation	Completion Requirement	Agency Responsible for Verification
<p>weather conditions or visibility prevent the visual detection of green sea turtles or marine mammals in the shutdown zones, such as heavy fog, low lighting, or sea state, in-water construction activities with the potential to result in Level A Harassment (injury) or Level B Harassment (disturbance) shall not be conducted until conditions change. The following shutdown zones, and buffers, will avoid the potential for impacts.</p> <p>For Demolition (assuming vibratory pile removal):</p> <ul style="list-style-type: none"> A shutdown zone consisting of the area within 500 meters of work would be required to avoid potential injury and behavioral effects to green sea turtles, managed fish, and marine mammals. <p>For Construction (assuming impact pile driving):</p> <ul style="list-style-type: none"> A shutdown zone consisting of the area within the 160-decibel (dB) root mean square (rms) isopleth (117 meters from source), plus a buffer of 200 meters, would be required to avoid the potential for Level A and B Harassment of green sea turtles, managed fish, and marine mammals (317 meters total). 				

Table MMRP-1
Portside Pier Restaurant Redevelopment Project
Mitigated Negative Declaration Mitigation Monitoring and Reporting Program

Mitigation Measure	Monitoring Requirement	Responsible for Mitigation Implementation	Completion Requirement	Agency Responsible for Verification
<p>Additional requirements:</p> <ul style="list-style-type: none"> Prior to the start of any pile-driving activities, the construction contractor shall implement a soft-start procedure to provide additional protection to green sea turtles, marine mammals, and fish. Soft start provides a warning and/or gives individuals a chance to leave the area prior to the hammer operating at full power. The soft-start procedure would require contractors to activate the impact hammer with an initial set of three strikes at 40 percent or less energy, separated by three 30-second waiting periods. If at any point pile driving stops for greater than one hour, then the soft start procedure must be conducted prior to the start of further pile driving activities. Observers will observe for 30 minutes after construction has ended. Construction activities requiring observers will commence 45 minutes after sunrise, and 45 minutes before sunset to provide the observers with enough visibility to observe marine species in the project area. Biological monitoring shall be conducted by qualified observers. The observers shall be trained in green sea turtle and marine mammal identification and behaviors, and would have no other construction-related tasks. The 				

Table MMRP-1
Portside Pier Restaurant Redevelopment Project
Mitigated Negative Declaration Mitigation Monitoring and Reporting Program

Mitigation Measure	Monitoring Requirement	Responsible for Mitigation Implementation	Completion Requirement	Agency Responsible for Verification
<p>observers shall determine the best vantage point practicable to monitor and implement shut-down/notification procedures, when applicable, by notifying the construction superintendent and/or hammer operator.</p> <ul style="list-style-type: none"> During all observation periods, observers shall use binoculars and the naked eye to scan continuously for green sea turtles and marine mammals. As part of the monitoring process, the observers shall collect sightings data and behavioral responses to pile-removal and pile-driving from green sea turtles and marine mammals observed within 500 feet of the proposed project site of activity and shutdown zones during the period of construction. The observer shall complete a sighting form (paper or electronic) for each pile-driving day (see Attachment B of Appendix 3). The observer shall submit the completed forms to NMFS and the District within 60 days of the completion of the monitoring with a summary of observations. 				

Table MMRP-1 Portside Pier Restaurant Redevelopment Project Mitigated Negative Declaration Mitigation Monitoring and Reporting Program				
Mitigation Measure	Monitoring Requirement	Responsible for Mitigation Implementation	Completion Requirement	Agency Responsible for Verification
BIO-4: Prior to the commencement of construction activities that would result in increased water coverage, an amount equating to the loss of open water associated with the proposed project shall be offset by deducting an amount from the District's shading credit program established pursuant to Board Policy 735. Additionally, the project applicant shall implement design modifications, such as incorporating translucent areas over the water. The deduction to the District's shading credits shall be equivalent to that of the proposed project's final increase in shading (i.e., less any reductions achieved by design modifications) to the satisfaction of NMFS and USACE. Applicant shall pay to the District fair market value, as determined by a District study of similar credits, for the shading credits.	Pre-Construction	Applicant	Prior to demolition and construction activities	Port District
Hazards and Hazardous Materials				
HAZ-1: Airport Land Use Commission (ALUC) formal review and determination on the proposed project shall be obtained prior to initiation of project construction.	Pre-Construction	Applicant and District	Prior to initiation of construction	Port District

Table MMRP-1 Portside Pier Restaurant Redevelopment Project Mitigated Negative Declaration Mitigation Monitoring and Reporting Program				
Mitigation Measure	Monitoring Requirement	Responsible for Mitigation Implementation	Completion Requirement	Agency Responsible for Verification
Transportation/Traffic (Parking)				
TRA-1 To reduce the impacts associated with temporary loss in parking during construction of the proposed project, the applicant and/or construction contractor will implement the following: <ul style="list-style-type: none"> • Prior to construction, the applicant or construction contractor will obtain written agreement from the Wyndham Hotel, or other parking facility with sufficient space, to guarantee parking for construction personnel through the duration of construction of the proposed project. • During initial site preparation, the construction contractor will post signage at the temporarily displaced parking spaces to direct visitors to nearby available parking. 	Pre-Construction and Construction	Applicant	Prior to construction and during construction	Port District
TRA-2: The applicant will implement the following parking management strategies to mitigate the projected parking deficiency: <ul style="list-style-type: none"> • Coordination - On-going daily coordination between the proposed project and parking lot operators, such as ACE parking, to identify which surrounding lots have available parking at different times of the day. • Wayfinding Signage - Provide changeable signage to direct patrons to the parking facilities (as identified by ACE on a weekly basis) that 	Prior to Operation and Ongoing	Applicant	Prior to and during operation	Port District

Table MMRP-1
Portside Pier Restaurant Redevelopment Project
Mitigated Negative Declaration Mitigation Monitoring and Reporting Program

Mitigation Measure	Monitoring Requirement	Responsible for Mitigation Implementation	Completion Requirement	Agency Responsible for Verification
<p>have parking availability.</p> <ul style="list-style-type: none"> • Transportation Network Companies – Coordination with companies (such as Lyft, Uber, etc.) to encourage patrons to utilize this mode of transportation as an alternative to driving their personal vehicle. • Valet Parking – Secure 979 parking spaces (Secured Parking) at one or more parking lots and provide a valet service in order to avoid overflow in the immediate surrounding parking areas. Prior to Certificate of Occupancy, the applicant will enter into a contract or agreement with a parking operator or equivalent entity securing the Secured Parking and provide the agreement to the District. The agreement shall be updated on an annual basis with proof of said agreement being submitted to the District on an annual basis. Alternatively, the applicant may submit evidence to District that it has acquired the Secured Parking at an off-site location for the valet parking operation. <p>After the first year of operation or anytime thereafter, the applicant may submit a parking study (Parking Study) to the District for its review and approval. The Parking Study shall include, at a minimum, the number of Secured Parking used for its valet operations on a monthly basis, broken down into morning,</p>				

Table MMRP-1
Portside Pier Restaurant Redevelopment Project
Mitigated Negative Declaration Mitigation Monitoring and Reporting Program

Mitigation Measure	Monitoring Requirement	Responsible for Mitigation Implementation	Completion Requirement	Agency Responsible for Verification
<p>afternoon and evening timeframes, for the previous year. Based on the District's review of the study, the number of Secured Parking may be reduced for a maximum period of two years. The reduction in Secured Parking shall not be less than the highest monthly use of the Secured Parking in the previous year and the reduction may be granted in the District's sole and absolute discretion. Prior to the elapse of the two-year period, a new Parking Study may be submitted to the District for its review and approval based on the same requirement stated herein. If a new Parking Study is not submitted to the District or during the District's review of the new Parking Study (if said review overlaps with the two-year period), the applicant shall secure 979 parking spaces with a parking operator or equivalent entity through an agreement that shall be submitted to the District.</p> <ul style="list-style-type: none"> • Water Taxi – Applicant shall coordinate with a water taxi company to encourage patrons to utilize water taxis as an alternative to driving their personal vehicle. • Bike Racks – Provide bike racks on the project site or adjacent thereto on the promenade to encourage employees/patrons to bike to the proposed project. 				

Table MMRP-1
Portside Pier Restaurant Redevelopment Project
Mitigated Negative Declaration Mitigation Monitoring and Reporting Program

Mitigation Measure	Monitoring Requirement	Responsible for Mitigation Implementation	Completion Requirement	Agency Responsible for Verification
<ul style="list-style-type: none"> • Bike Share Stations – Coordinate with companies like DECOBIKE to ensure a bike share station is maintained within walking distance (approximate 1,000 feet) to the proposed project. • Public Transit – On the applicant’s website, promote and encourage employees and patrons to utilize alternative modes of transportation as an alternative to driving their personal vehicle. • Public Transit Subsidies for Employees – Provide reimbursement or subsidies for public transportation costs for all employees. • Port of San Diego (formerly Big Bay) Shuttle – Participate in the District’s on-going shuttle program. • Employee Off-Site Parking – Designate an off-site parking lot for employees and provide shuttle service between the off-site facility and the proposed project, such as: <ul style="list-style-type: none"> ○ Portman Hotel: (+400 stalls) ○ 610 West Ash Street: (+410 stalls) ○ 410 West Ash Street (+510 stalls) ○ 1230 Columbia Street (+228 stalls) 				

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4421
(619) 767-2370



August 31, 2016

Submitted electronically on August 31, 2016.
Hard copy to follow.

Wileen Manaois
San Diego Unified Port District
Real Estate Development
3165 Pacific Hwy
San Diego, CA 92101

Subject: Staff Comments on the Portside Pier Restaurant Redevelopment Project and
Associated Mitigated Negative Declaration

Dear Ms. Manaois:

Thank you for the opportunity to review and provide comment on the above-referenced project and the environmental document, which was received on August 2, 2016. The proposed project is located at 1360 North Harbor Drive and includes demolition of the existing 23,285 sq. ft. Anthony's Grotto Restaurant building, 23,285 sq. ft. building platform, 66 concrete piles and remnants of the 565 sq. ft. dock, and the installation of 53 new concrete piles and construction of a new platform 37,225 sq. ft. restaurant building, 28,330 sq. ft. platform, and 3,370 sq. ft. dock. Preliminary comments were provided to Port staff and the project proponent during an initial meeting on the subject project on May 4, 2016.

Port Master Plan Update

The Port is currently conducting a Port Master Plan (PMP) Update that *will serve as a long-term guide to carry the Port through the next 50 years*,¹ and include opportunities for public input throughout the process. Ideally, the PMP Update should be completed prior to moving forward with this project, or any other major project, to ensure that the proposed project and associated lease for that same 50 year term is aligned with the vision and policies contained in the comprehensive PMP Update. In addition to this proposal, there are also a number of other significant leasehold redevelopments under consideration for the North Embarcadero and, for optimum planning outcomes, it would be beneficial for all such actions to be deferred until the PMP Update is completed which is projected occur in the next two –three year time period.

Project is Appealable and a PMPA is Required

Of primary concern to Commission staff is the assertion that a future Coastal Development Permit (CDP) necessary for demolition of the existing restaurant and construction of an entirely new restaurant complex and associated pier would not be

¹ <https://www.portofsandiego.org/integrated-planning.html>

EXHIBIT NO. 5

A-6-PSD-17-0003

8.31.16 CCC MND

Comment Letter

1 of 10

California Coastal Commission

appealable to the California Coastal Commission (CCC) nor require a PMP Amendment (PMPA). The only explanation is given on Page 60 of the Draft Initial Study:

*The project site also lies within the boundary of the Coastal Zone and is subject to the requirements of the California Coastal Act (Coastal Act). The District would issue a non-appealable CDP for the proposed project consistent with the PMP as certified by the California Coastal Commission. **The proposed development type is not listed as ‘appealable’ per Chapter 8 Ports (§30715)3 of the California Coastal Act. As such the proposed project is subject to a non-appealable CDP, and a PMP amendment is not required to add the proposed project to the project list.** [emphasis added]*

Project is Appealable

Commission staff has historically provided direction to the Port that restaurants fall under the category of “shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes” and are therefore appealable under Section 30715(a)(4) of the Coastal Act. Most recently, the finding that restaurants are appealable developments was discussed in detail as part of the Commission’s appeal of the Sunroad project (Appeal No. A-6-PSD-13-005) in 2013. The Commission found that restaurants are in fact appealable developments under the Coastal Act. The full text from the staff report dated August 29, 2013 can be viewed in its entirety on the CCC website;² however, the findings important to the subject project are reiterated in italics below for the benefit of the Port and the public:

Restaurants Are Appealable Development

[...]

Unlike many of California’s commercial-oriented ports, the San Diego Unified Port District tidelands has a large visitor-serving, public access and recreation component that includes public parks, public accessways, hotels, restaurants, retail shopping districts, and recreational boating facilities, as well as more traditional industrial and commercial fishing facilities. The certified Port Master Plan categorizes restaurants under two commercial recreation land uses, “Hotels and Restaurants,” which obviously describes uses commonly associated with hotels, and “Specialty Shopping,” which includes stores and restaurants that are not specifically associated with boating and marine services (those uses are categorized as “Marine Sales and Services”). There are currently eleven new restaurants proposed and listed on the project lists for various districts in the PMP; some are part of proposed hotel developments, others are within shopping districts such as Seaport Village. Several restaurants, such as proposed restaurants on new piers at Grape Street (PMPA #27) and on the existing Imperial Beach pier (PMPA #24), and in the Chula Vista Harbor District (PMPA #41), are not associated with either hotel or shopping facilities. However, in every case, each restaurant proposed in the PMP is categorized as an appealable development.[...]

² <http://documents.coastal.ca.gov/reports/2013/9/W21a-9-2013.pdf>

Section 30009 of the Coastal Act provides that the Coastal Act “shall be liberally construed to accomplish its purposes and objectives.” In interpreting section 30009, courts have found that “[w]hen a provision of the Coastal Act is at issue, [they] are enjoined to construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations.” (McAllister v. California Coastal Commission (2008) 169 Cal.App.4th 912, 928.) In consideration of the foregoing legal framework, section 30715(a)(4) of the Coastal Act necessarily includes restaurants as an appealable development for the following reasons.

First, considering the language of section 30715 of the Coastal Act as a whole, the categories of appealable development relate to development that has no water-oriented purpose consistent with typical port-related operations. Subsection (a)(2) calls out waste-water treatment facilities as appealable unless the facility processes waste incidental to normal port activities or by vessels (emphasis added). Subsection (a)(3) calls out roads that are not principally for internal circulation within port boundaries (emphasis added). In other words, roads that are used for port-related operations like Quay Avenue in the City of National City, which solely provides a north-south route between port-related storage facilities. Subsection (a)(4) calls out office and residential buildings as appealable if they are not principally devoted to the administration of activities within the port (emphasis added). Subsection (a)(4) also calls out shopping facilities if they are not principally devoted to the sale of commercial goods utilized for water-oriented purposes (emphasis added).

Considering the foregoing, and by giving effect to the statutory section as a whole, the exceptions to appealable development in the relevant subsections of section 30715 of the Coastal Act only apply if there is a water-oriented purpose that is consistent with port-related operations. Key words like “normal port activities,” “internal circulation within port boundaries;” “administration of activities within the port,” and “water-oriented purposes” illustrate the underlying intent of section 30715 that the stated exceptions to appealable developments are those that have a principal interaction with water-oriented and port-related operations. Therefore, since restaurants serve the general public and not just port employees and cargo ship pilots on break as their ships are loaded, the consideration of related provisions in section 30715 of the Coastal Act that have exceptions concerning port-related operations lead to an interpretation that restaurants are appealable development because they are not principally devoted to water-oriented purposes consistent with typical port- related operations.

Second, a restaurant is a type of “shopping facility” and to conclude otherwise would lead to absurd results... “Shopping facility” is not defined in the Merriam-Webster Dictionary. “Shopping center,” however, is defined in the Merriam-Webster Dictionary. Facility is defined as “something (as a hospital) that is built, installed, or established to serve a particular purpose.”³ “Center” is defined as “a facility providing a place for a particular activity or service <a day-care center>.”

³ <http://www.merriam-webster.com/dictionary/facility>

(emphasis added)⁴ Given the synonymous nature of “center” and “facility,” the definition of “shopping center” shall be used to establish that a restaurant is necessarily included as an appealable development under section 30715(a)(4) of the Coastal Act. Merriam-Webster defines “shopping center” as “a group of retail stores and service establishments usually with ample parking facilities and usually designed to serve a community or neighborhood.” (emphasis added)⁵ Several dictionary sources define “restaurant” as a place or establishment where people from the public pay to sit and eat meals that are served to them.⁶⁷⁸⁹¹⁰ Clearly, to interpret “shopping facility” as not necessarily including restaurants as an appealable development given the definition of the “shopping center,” which is synonymous to “shopping facility” and includes service establishments like restaurants, would lead to an absurd result inconsistent with the enlarged meaning of the term “shopping facility.” This plain reading of the term “shopping facility” further bolsters the Commission’s precedent of treating restaurants as appealable development and supports the purpose of section 30715, noted above, which is to retain appellate jurisdiction over development that is not a principally related to water-oriented and port-related operations.

Finally, there is no basis to find that a restaurant is a shopping facility that is principally devoted to the sale of commercial goods utilized for water-oriented purposes, and is thus still non-appealable. As noted above, restaurants are establishments that serve food and drinks to people for consumption within the restaurant. The definition of restaurant does not include a description that a restaurant sells goods utilized for water-oriented purposes. [...]

In addition, the Port has identified some components of larger projects as non-appealable (i.e., vista points and Broadway Pier infrastructure improvements within the North Embarcadero Redevelopment Project) within the projects lists included in the PMP; however, in no instance is a restaurant listed as non-appealable when a part of a larger project. In any case, it is factually incorrect to characterize the proposed project as simply a restaurant when it is a complex of eating establishments, of which one does not even contain chairs, and a dock.

Port Master Plan Amendment Required

The subject development is located in the Civic Zone of Planning District 3 of the PMP. The current text and project list in the PMP pertaining to the Civic Zone does not identify redevelopment of the site. While the MND acknowledges that the proposed project will need to be added to the project list, it denies that a PMPA would be required to do so

⁴ <http://www.merriam-webster.com/dictionary/center>.

⁵ <http://www.merriam-webster.com/dictionary/shopping%20center>.

⁶ <http://www.thefreedictionary.com/restaurant>

⁷ <http://oxforddictionaries.com/definition/english/restaurant>

⁸ <http://www.answers.com/topic/restaurant>

⁹ <http://dictionary.reference.com/browse/restaurant>

¹⁰ <http://en.wikipedia.org/wiki/Restaurant>

stating “...a PMP amendment is not required to add the proposed project to the project list”. However, any modification to the certified PMP, including the addition of a proposed project to the project list, requires a PMPA approved by the CCC. Therefore, a PMPA is required to add the proposed project to the project list with sufficient details and specificity before a CDP can be issued.

In summary, the project description should be modified to reflect the appealable status of the project and a PMPA will be needed to incorporate the proposed project into the PMP, including addition of the proposed restaurant complex and dock to the Project List for the Centre City Embarcadero Planning District.

Finally, we respectfully request notice of any future action taken on the subject project, including the final environmental document and final action on a CDP.

Water Coverage

MND Table ES-1, Existing and Proposed Project Features Comparison, shows the Building Gross Water Coverage increasing by 1,675 sq. ft. Mitigation Measure Bio-4 identifies the proposed mitigation for the increase in water coverage:

Prior to the commencement of construction activities, the loss of 4,480 square feet of open water associated with the proposed project shall be offset by implementing design modifications, such as incorporating translucent areas, to reduce shading and by deducting an amount from the District’s shading credit program established pursuant to Board Policy 735 equivalent to that of the proposed project’s final shading total (i.e., less any reductions achieved by design modifications) to the satisfaction of NMFS and USACE.

One of the primary impacts of increased open water coverage is reduced foraging habitat for birds. While translucent areas may be appropriate to offset shading impacts, they do not mitigate the obstruction of foraging opportunities and are not an appropriate form of mitigation for open water coverage.

In addition, Board Policy 735 allows for land, water area, natural or constructed habitat to be used as credit for open water coverage mitigation. However, because a restaurant is not a coastal dependent use, the only appropriate mitigation for an increase in overwater coverage is to decrease an equal amount of overwater coverage by removing an existing structure that currently covers the bay. Commission staff recommends that this project be redesigned to avoid an increase or even reduce the open water coverage of the existing development; however, if the project proponent insists on increasing open water coverage, the MND should clearly identify and describe where an existing overwater structure would be removed in order to offset that increase.

Parking

Commission staff is concerned that the MND and its Appendix 8 Transportation Impact Analysis does not seriously consider the effect that the proposed project will have on the already impacted area in regards to parking and in turn, the impact on access to the bay and waterfront. In addition, the MND incorrectly defines and calculates the parking problem, need, and mitigation requirements. More specific comments on parking are provided below:

- MND Transportation/Traffic (Parking) Section, Existing Conditions, describes the available public transportation in detail; however, it does not include any description of available parking in the project area. The Port has released numerous studies recently documenting the lack of parking in the North Embarcadero area and the subject environmental document should include a detailed discussion of the findings from those parking studies in order to adequately assess the potential impacts of an expansion of the existing restaurant use in this area.
- Mitigation Measure TRA-2 requires parking management strategies be implemented to mitigate the projected parking deficiency. These strategies include coordination with ACE parking and transportation companies such as Uber and Lyft, wayfinding signage, valet parking, water taxi, bike racks and share stations, website promotion of public transportation, participation in the Big Bay shuttle, and employee off-site parking. Given the deficit of parking in the area, the project proponent is encourage to expand on these mitigation measures to maximize use of alternative transportation and provide employee public transportation subsidies, secure bicycle racks and showers for employees that choose to commute by bike, and promotional offerings to patrons that use alternative transportation.

Appendix 8: Portside Pier Transportation Impact Analysis comments:

- Table 8.2 displays the maximum number of parking spaces required for the project, based on the net increase of square footage between the existing site and the proposed project. While the Tidelines Parking Guidelines do allow this calculation for projects that “*involve expansions or modifications of existing uses,*” the subject project is not an expansion or modification of an existing use, as the existing site will be completely demolished and an entirely new development with multiple restaurants will be constructed in its place. Thus, the parking space calculation should be revised based solely on the new development that is proposed.

Additionally, the Parking Rate Adjustments in Table 8.1 include a parking space credit/reduction for Dedicated Water Transportation Service due to the inclusion of ten boat slips as a project feature. However, the Tidelines Parking Guidelines state that this adjustment is to apply to uses that are “...*adjacent to or provide a*

dedicated water taxi or ferry service that operates in a manner which would offer an alternative to using an automobile to reach the site.” While the proposed boat slips would allow guests with private boats to dock and dine, this parking rate adjustment is not appropriate unless the project includes implementation of a dedicated water taxi or ferry service to and from the restaurant. If the applicant proposes to use this adjustment, it should be clear in the MND that a water taxi or ferry service is proposed as part of the project and that a portion of the 10 boat slips will be dedicated for water taxi/ferry service use and not available for the docking of private boats. Alternatively, the Port could adjust and justify any proposed parking credit, such as deducting one parking space requirement for each boat slip proposed.

In accordance with comments above, Commission staff has recalculated the parking requirements below, based on the entire square footage of the new building without the adjustment for the Dedicated Water Transportation Service:

Restaurant¹¹: 37,225 k.sq.ft. x 9.3 = 346.19 spaces

Proximity to Public Waterfront Amenities for Public Access: 346.19 spaces x 0.25 increase = 86.55 space increase

Proximity to Transit: 346.19 spaces x 0.12 reduction = 41.54 space reduction

Total Required: 346.19 spaces + 86.55 spaces – 41.54 spaces = 391 spaces

The 391 required spaces is significantly more parking than the original 84 required spaces calculated in the MND; and, as such, the analysis and mitigation discussions in the MND should be revised accordingly.

- The Transportation Impact Analysis states that ACE estimates that over 1,000 stalls sit empty at its parking garages every day, and has committed to providing those spaces for this project. However, the data provided for the estimates in the Port’s North Embarcadero Focused Parking Study were also provided by ACE and show a significant deficit. This discrepancy must be addressed. It should also be clear that the parking spaces that are reserved for restaurant employees and patrons are available during both peak and non-peak times. All deficiencies in parking availability should also be addressed.

In addition, a discrepancy exists between the availability of specific lots included in the MND and the North Embarcadero Focused Parking Study. Specifically, the MND suggests the following lots could be used as mitigation for lack of employee parking and also could be used to calculate available parking for the project, while the North Embarcadero Parking Study finds that these lots will not be fully available at the time the project is constructed:

¹¹ Dock not included. Guidelines state that the area should include the gross area of the building footprint so restaurant and public deck account for total gross area (33,577 sq.ft. + 3,648 sq.ft.=37,225 sq. ft.).

- Wyndham Hotel: North Embarcadero Focused Parking Study states that these spaces are only available during low parking demand at the hotel.
- Navy Pier: North Embarcadero Focused Parking Study includes the elimination of most of the parking on Navy Pier in the near-term.

Again, this discrepancy should be addressed. Neither the Wyndham Hotel nor Navy Pier should be relied upon in the calculation of available parking for the subject project.

Public Access – Operation

The proposed restaurant complex will be located on public land. As such, it is essential that public access is clearly provided at the site. While we appreciate the inclusion of a free public viewing deck, we continue to be concerned that maintaining the entrance of the public deck through the interior of the restaurant building and requiring the public to enter the restaurant to access the public deck, instead of providing a direct entrance from the public promenade, will be a deterrent for public use and discourage use of the deck. As recommended at our May 4, 2016 meeting with Port staff and the project proponent, the project should be redesigned so that the entrance to the public deck is accessible from the public promenade to provide maximum access to the public.

In addition, at our May 4, 2016 meeting, the subject project was presented with a continuous public walkway around the perimeter of the ground floor. It is unclear if the feature has since been removed, as the floor plans in Figure 4a of the MND instead shows seating around the perimeter of the ground floor. The inclusion of a continuous walkway design around the perimeter of the building platform is necessary to increase coastal access at the site and recapture public views. Any public space should also be separate from private areas so that the public feels welcomed and not as if they are intruding in the private restaurant space.

The project proponent is also encouraged to maximize public access to the public deck and walkway by allowing public access from dusk until dawn and during hours of operation. Please include in the MND the hours the public will be able to access the deck, as well as the hours of operation for the five eating establishments included in the project.

Finally, the MND states that signage will be used to direct the public to the public viewing deck. Please provide additional information on public access signage in the MND, including the placement of signs and if signs will also be used to direct the public to the ground floor perimeter walkway.

Public Access – Construction

In addition, the proposed project construction and demolition schedule includes work on Saturdays and during summer months. This is a high traffic, visitor-oriented area with key access components. How is the construction schedule designed to accommodate the public?

Lighting

The project description of the MND describes the lighting associated with the project, which includes:

- Backlit illuminated signage on the waterside- and promenade-facing frontages of the building to display the names and/or logos for Miguel's Cocina, Ketch Grill & Taps, Brigantine Seafood and Oyster Bar, Portside Gelato & Coffee, and Portside Pier. Signs would range in size from 12 to 43 feet in length and from 3 feet, 2 inches to 12 feet, 11 inches in height. Five signs would face the promenade and five would face the water.
- LED panels along the North Embarcadero Promenade and along the upper deck on the waterside-facing frontage of the building to display upcoming events, menu specials, and other notifications.
- LED illuminated "baskets" surrounding the building. It appears that there are two baskets.
- LED light tube strips on the promenade-facing frontage of the building.
- An internally-illuminated sculptural centerpiece on the outdoor bar of The Brigantine's second floor, for artistic purposes.

Historically, the Commission has been concerned that this type of lighting and signage may adversely impact scenic resources and viewsheds to and along the bay, add to general visual clutter, and be out of character with the surrounding development. In the case of the proposed development, it appears that these concerns are substantiated. The large amount and size of individual signs and lights on the single two-story building will be overwhelming visually, especially as the signage will be advertisement seen from both land and water. Collectively, the building will emit an amount of light that is likely to distract from views of the bay. Finally, the signage and lighting would far exceed that associated with the current building and of neighboring buildings and would not be in character with the surrounding development.

Sea Level Rise

The project has analyzed sea level rise for the structure over a 50 year period, and states

“The project life is expected to be 30 to 50 years based on the proposed project lease with the District and the life expectancy of materials in the marine environment.” The life of the structure should not be tied to the lease of the project as its length is based on legal and not physical circumstances. It is also unclear what evidence there is for the life expectancy of materials in the marine environment. The current building was constructed in 1965, over 65 years ago and is still in operation and considered safe. The project should instead be analyzed based on a 75 year life as recommended in the Commission’s Adopted Sea Level Rise Guidance¹². In addition, any adaptive management strategies should be considered prior to the development of the project, and the development of adaptive strategies should not be deferred to 2058 as the MND suggests.

Alternatives Analysis

Finally, the MND fails to discuss alternatives to the proposed project. Considering the noted parking deficits and the large increase in open water coverage, the Port should analyze and discuss a reduced-project alternative, at least, in the final environmental document.

Thank you again for the opportunity to provide review and comment on the proposed project. If you have any questions or require further clarification, please do not hesitate to contact me at the above office.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Lasiter".

Melody Lasiter
Coastal Program Analyst

Cc (copies sent via e-mail):
Sherilyn Sarb (CCC)
Deborah Lee (CCC)
Kanani Brown (CCC)

¹² <http://www.coastal.ca.gov/climate/slrguidance.html>.

LETTER D: CALIFORNIA COASTAL COMMISSION

Commenter: Melody Lasiter, Coastal Program Analyst

Date: August 31, 2016

EXHIBIT NO. 6

A-6-PSD-17-0003

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4421
(619) 767-2370



August 31, 2016

Submitted electronically on August 31, 2016.
Hard copy to follow.

Wileen Manaois
San Diego Unified Port District
Real Estate Development
3165 Pacific Hwy
San Diego, CA 92101

Subject: Staff Comments on the Portside Pier Restaurant Redevelopment Project and
Associated Mitigated Negative Declaration

Dear Ms. Manaois:

Thank you for the opportunity to review and provide comment on the above-referenced project and the environmental document, which was received on August 2, 2016. The proposed project is located at 1360 North Harbor Drive and includes demolition of the existing 23,285 sq. ft. Anthony's Grotto Restaurant building, 23,285 sq. ft. building platform, 66 concrete piles and remnants of the 565 sq. ft. dock, and the installation of 53 new concrete piles and construction of a new platform 37,225 sq. ft. restaurant building, 28,330 sq. ft. platform, and 3,370 sq. ft. dock. Preliminary comments were provided to Port staff and the project proponent during an initial meeting on the subject project on May 4, 2016.

D-1

Port Master Plan Update

The Port is currently conducting a Port Master Plan (PMP) Update that *will serve as a long-term guide to carry the Port through the next 50 years*,¹ and include opportunities for public input throughout the process. Ideally, the PMP Update should be completed prior to moving forward with this project, or any other major project, to ensure that the proposed project and associated lease for that same 50 year term is aligned with the vision and policies contained in the comprehensive PMP Update. In addition to this proposal, there are also a number of other significant leasehold redevelopments under consideration for the North Embarcadero and, for optimum planning outcomes, it would be beneficial for all such actions to be deferred until the PMP Update is completed which is projected occur in the next two –three year time period.

D-2

Project is Appealable and a PMPA is Required

Of primary concern to Commission staff is the assertion that a future Coastal Development Permit (CDP) necessary for demolition of the existing restaurant and construction of an entirely new restaurant complex and associated pier would not be

D-3

¹ <https://www.portofsandiego.org/integrated-planning.html>

RESPONSE TO LETTER D

California Coastal Commission

Commenter: Melody Lasiter, Coastal Program Analyst

Date: August 31, 2016

All documents referenced in Attachment D (Comments Received and District Responses), are available for public review in the SDUPD Office of the District Clerk, 3165 Pacific Highway, San Diego, CA 92101.

Response to Comment D-1: This is an introductory comment summarizing the project and identifying that preliminary comments were provided to the District and Applicant on May 4, 2016.

Response to Comment D-2: Only consistency with adopted land use plans must be considered under CEQA (See CEQA Guidelines 15125(d); Chaparral Greens v. City of Chula Vista (1996) 50 Cal.App.4th 1134, 1145 fn. 7) and hence, the proposed project's consistency with the Port Master Plan (PMP) Update (PMPU), which is ongoing and not yet approved by the District or certified by the California Coastal Commission is not required under CEQA.

Moreover, there is no requirement in the California Coastal Act (Coastal Act), the Port Act, or otherwise that the Port update its PMP on a regular basis. Rather, the PMPU is a voluntary initiative. In fact, once a PMP has been certified by the California Coastal Commission (like the District's PMP), coastal permitting authority shall be granted to the corresponding port. (Coastal Act Section 30715.) The Coastal Act does not – unlike other planning laws – place any prohibitions on amending the certified PMP to a certain number a year or require regular updating of the plan. (See e.g., California Government Code Sections 65358, which limits the number of general plan amendments to 4 per year and 65302, which requires certain elements of a general plan be regularly updated.) In 1981, the District's PMP was certified by the California Coastal Commission. The PMP includes the project site, which is designated as commercial recreation. Commercial recreation allows for restaurant uses. Accordingly, a restaurant complex currently exists on the project site. The project proposes to redevelop the project site with a similar restaurant complex in accordance with the commercial recreation land use designation.

Pending the PMPU, the Board adopted Board of Port Commissioners Policy 752, which provides that when a PMP Amendment is not required, the development proposal may advance as part of the normal project review process. This is the case here, where the same non-appealable use is being proposed consistent with the commercial recreation use designation and language of the PMP. Moreover, the policy states that proposed projects that require a PMP amendment will be evaluated against the guiding principles and guidelines resulting from the initial phases of the Integrated Planning process, along with all current applicable and legal regulations and procedures. Nowhere does the Policy require development cease pending the PMPU.

(response continued on following page)

Page Intentionally Left Blank – Continuation of Response

Response to Comment D-2 (continuation from previous page): Stopping redevelopment or development on the grounds that the District is processing the PMPU would also constitute an unlawful development moratorium. (See e.g., California Government Code Section 65858.) In order to impose such a moratorium, the District would need to find and identify a specific significant, quantifiable, direct and unavoidable impact upon the public health or safety that would result from continued development approvals. (Id.; Hoffman Street LLC v. City of West Hollywood (2009) 179 Cal.App.4th 754.) Redevelopment that replaces an existing use with the same use, such as what is included in the proposed project, has not been identified to result in impacts to public health or safety. The Board of Port Commissioners has been clear that it has not and is not contemplating imposing such a development moratorium. Moreover, the Coastal Commission cannot impose such moratoriums where, like here, a PMP has been certified because such certification divests the Coastal Commission of coastal land use authority. Therefore, there is no legal basis to stop development, like the proposed project or otherwise, while the PMPU is proceeding nor has there been a desire expressed by the District or its Board.

Response to Comment D-3: Pursuant to the Coastal Act, the District's Coastal Act regulations and past practice, the proposed project is considered "non-appealable". Chapter 8 of the Coastal Act regulates port development within the California coastal zone. Section 30715 of Chapter 8 specifies the sole categories of development that may be appealed to the Coastal Commission. Neither restaurants nor eating establishments are listed as appealable in Section 30715.

The commenter quotes to Coastal Commission staff report on the Sunroad restaurant project (Appeal No. A-6-PSD-13-005) (Sunroad Project) for the proposition that a "restaurant" is per se "appealable." The Sunroad Project was the redevelopment of a site with a restaurant that was historically developed with a restaurant, but was not existing at the time of redevelopment. Unlike here, where a non-appealable Coastal Development Permit is proposed, the Port issued a Coastal Act exclusion/exemption for the Sunroad Project but failed to issue the notice required by Section 30717 of the Coastal Act, which starts the 10-working-day appeal period for exclusions/exemptions. The exemption/exclusion was appealed and after finding a substantial issue, the Coastal Commission conducted a de novo hearing and issued a CDP for the Sunroad Project. That situation was factually distinguishable as an exclusion/exemption was issued. Here, a non-appealable CDP is proposed.

In addition, the commenter's letter relies on its interpretation that Section 30715(a)(4) of the Coastal Act includes restaurants. That section includes the following as appealable categories of development: "Office and residential buildings not principally devoted to the administration of activities within the port; hotels, motels, and shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes; commercial fishing facilities; and recreational small craft marina related facilities."

(response continued on following page)

Portside Pier Restaurant Project
August 31, 2016
Page 2

appealable to the California Coastal Commission (CCC) nor require a PMP Amendment (PMPA). The only explanation is given on Page 60 of the Draft Initial Study:

*The project site also lies within the boundary of the Coastal Zone and is subject to the requirements of the California Coastal Act (Coastal Act). The District would issue a non-appealable CDP for the proposed project consistent with the PMP as certified by the California Coastal Commission. **The proposed development type is not listed as 'appealable' per Chapter 8 Ports (§30715)3 of the California Coastal Act. As such the proposed project is subject to a non-appealable CDP, and a PMP amendment is not required to add the proposed project to the project list.** [emphasis added]*

Project is Appealable

Commission staff has historically provided direction to the Port that restaurants fall under the category of “shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes” and are therefore appealable under Section 30715(a)(4) of the Coastal Act. Most recently, the finding that restaurants are appealable developments was discussed in detail as part of the Commission’s appeal of the Sunroad project (Appeal No. A-6-PSD-13-005) in 2013. The Commission found that restaurants are in fact appealable developments under the Coastal Act. The full text from the staff report dated August 29, 2013 can be viewed in its entirety on the CCC website;² however, the findings important to the subject project are reiterated in italics below for the benefit of the Port and the public:

Restaurants Are Appealable Development

[...]

Unlike many of California’s commercial-oriented ports, the San Diego Unified Port District tidelands has a large visitor-serving, public access and recreation component that includes public parks, public accessways, hotels, restaurants, retail shopping districts, and recreational boating facilities, as well as more traditional industrial and commercial fishing facilities. The certified Port Master Plan categorizes restaurants under two commercial recreation land uses, “Hotels and Restaurants,” which obviously describes uses commonly associated with hotels, and “Specialty Shopping,” which includes stores and restaurants that are not specifically associated with boating and marine services (those uses are categorized as “Marine Sales and Services”). There are currently eleven new restaurants proposed and listed on the project lists for various districts in the PMP; some are part of proposed hotel developments, others are within shopping districts such as Seaport Village. Several restaurants, such as proposed restaurants on new piers at Grape Street (PMPA #27) and on the existing Imperial Beach pier (PMPA #24), and in the Chula Vista Harbor District (PMPA #41), are not associated with either hotel or shopping facilities. However, in every case, each restaurant proposed in the PMP is categorized as an appealable development.[...]

² <http://documents.coastal.ca.gov/reports/2013/9/W21a-9-2013.pdf>

D-3

Response to Comment D-3 (continuation from previous page): The California Coastal Commission-issued CDP for the Sunroad Project was subsequently challenged in a lawsuit filed by San Diegans for Open Government, Case. No. 37-2013-00057492-CU-TT-CTL (2013) (San Diegans for Open Government Lawsuit). In response to allegations by the petitioner and the California Coastal Commission that a “restaurant” was “appealable” under Section 30715(a)(4) because a restaurant was a type of “shopping facility, and akin to other appealable development,” the Court squarely ruled that a restaurant was not considered an “appealable” category development under the Coastal Act. (See Appendix I to these responses to comments, Sunroad Project Superior Court Decision to this document, p. 3; Decision, p. 3). This Court decision was subsequent to the California Coastal Commission staff’s interpretation that restaurants are appealable developments and sheds light on Section 30715. In addition to the Court’s ruling, for the reasons below, restaurants are non-appealable development under the Coastal Act.

Several Commissioners of the California Coastal Commission during the de novo hearing on the Sunroad Project also opposed this interpretation:

- “[S]hopping facilities not principally devoted to the sale of commercial goods utilized for water oriented purposes is not a restaurant. A restaurant is a restaurant.” (See Appendix II, California Coastal Commission Sunroad Project Hearing Transcript Excerpts, 11 AR 2705.)
- I “would have a hard time calling [a restaurant] a shopping facility” and that an “attempt to stretch that definition of a shopping facility is a little too broad for where we should be.” (See Appendix II, California Coastal Commission Sunroad Project Hearing Transcript Excerpts, 11 AR 2717-2718.)
- Staff’s interpretation that a restaurant is an appealable development is “shortcutting the rules on Section 7015” and such a staff policy of doing so should be reviewed by the California Coastal Commission. (See Appendix II, California Coastal Commission Sunroad Project Hearing Transcript Excerpts, 11 AR 2720-2721.)

Additionally, by reasonable interpretation, a restaurant is not a “shopping facility” and does not involve the “sale of commercial goods.” The commenter’s interpretation would expand appellate jurisdiction well beyond the plain language and intent of Section 30715(a)(4). Specifically, the Legislature used plain terms to describe “office and residential buildings,” “hotels,” “motels,” and it knew how to use a plain term to describe a “restaurant.” However, the Legislature did not do so, leaving restaurants as “non-appealable” developments.

The commenter also mentions other restaurants that the certified PMP has considered appealable. However, the Port has excluded/exempted eight restaurants and issued non-appealable CDPs for at least two restaurants: the Chart House and the Fish Market, both of which were standalone restaurants like that proposed by the project. (See Appendix III, District Restaurant Approvals, 2 AR 427-455, 3 AR 624-648, 2 AR 418-426.) While it is correct that some restaurants have been listed as appealable in the PMP or issued an appealable CDP that is only because they were a part of a larger appealable category development – like, The Wharf – Point Loma Marina LLC or The Ferry Landing Expansion. The Grape Street Pier and restaurant is identified in the PMP certified Port Master Plan as appealable because the development of the curvilinear Grape Street Pier, upon which the restaurant would be constructed, involves the demolition of a (former) commercial fishing support facility. **(response continued on following page)**

Section 30009 of the Coastal Act provides that the Coastal Act “shall be liberally construed to accomplish its purposes and objectives.” In interpreting section 30009, courts have found that “[w]hen a provision of the Coastal Act is at issue, [they] are enjoined to construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations.” (McAllister v. California Coastal Commission (2008) 169 Cal.App.4th 912, 928.) In consideration of the foregoing legal framework, section 30715(a)(4) of the Coastal Act necessarily includes restaurants as an appealable development for the following reasons.

First, considering the language of section 30715 of the Coastal Act as a whole, the categories of appealable development relate to development that has no water-oriented purpose consistent with typical port-related operations. Subsection (a)(2) calls out waste-water treatment facilities as appealable unless the facility processes waste incidental to normal port activities or by vessels (emphasis added). Subsection (a)(3) calls out roads that are not principally for internal circulation within port boundaries (emphasis added). In other words, roads that are used for port-related operations like Quay Avenue in the City of National City, which solely provides a north-south route between port-related storage facilities. Subsection (a)(4) calls out office and residential buildings as appealable if they are not principally devoted to the administration of activities within the port (emphasis added). Subsection (a)(4) also calls out shopping facilities if they are not principally devoted to the sale of commercial goods utilized for water-oriented purposes (emphasis added). Considering the foregoing, and by giving effect to the statutory section as a whole, the exceptions to appealable development in the relevant subsections of section 30715 of the Coastal Act only apply if there is a water-oriented purpose that is consistent with port-related operations. Key words like “normal port activities,” “internal circulation within port boundaries;” “administration of activities within the port,” and “water-oriented purposes” illustrate the underlying intent of section 30715 that the stated exceptions to appealable developments are those that have a principal interaction with water-oriented and port-related operations. Therefore, since restaurants serve the general public and not just port employees and cargo ship pilots on break as their ships are loaded, the consideration of related provisions in section 30715 of the Coastal Act that have exceptions concerning port-related operations lead to an interpretation that restaurants are appealable development because they are not principally devoted to water-oriented purposes consistent with typical port-related operations.

Second, a restaurant is a type of “shopping facility” and to conclude otherwise would lead to absurd results... “Shopping facility” is not defined in the Merriam-Webster Dictionary. “Shopping center,” however, is defined in the Merriam-Webster Dictionary. Facility is defined as “something (as a hospital) that is built, installed, or established to serve a particular purpose.”³ “Center” is defined as “a facility providing a place for a particular activity or service <a day-care center>.”

³ <http://www.merriam-webster.com/dictionary/facility>

Response to Comment D-3 (continuation from previous page): Accordingly, it was categorized as “appealable” consistent with Section §30715(a)(4) of the Coastal Act, which includes “commercial fishing facilities” as “appealable” developments and Section 30109 of the Coastal Act, which includes demolition within the definition of “development” as established in the coastal consistency analysis for PMPA 27. Additionally, Imperial Beach PMP Amendment, certified nearly 20 years ago in 1997, also included unidentified commercial uses on the pier as part of that development, which could have been considered appealable developments. Nonetheless, these approvals preceded the San Diegans for Open Government Lawsuit, which clarified the issue. Moreover, Anthony’s, which includes three restaurants and a walk-up coffee kiosk is not identified as “appealable” in the PMP. (See PMP, pg. 72-73.)

Only “appealable” developments must be described with sufficient detail to ensure consistency with the policies of Chapter 3 of the California Coastal Act. (Coastal Act Section 30711(a)(4).) Because a restaurant or groups of restaurants are non-appealable they would not need to be listed in the PMP.

While the District concurs that certain non-appealable projects are identified in the PMP on the “Project Lists,” there is no requirement to include any projects that are non-appealable on the list. The fact that some non-appealable projects are listed does not enact some requirement that all non-appealable projects be listed. (Coastal Act Section 30711(a)(4).)

The District disagrees with the assertion that characterization of the project is factually incorrect. As described in the Draft MND, the proposed project is a group of restaurants consisting of up to four dining opportunities (three restaurants and one walk in gelato establishment), which directly replaces the existing group of restaurants (three restaurants and a coffee kiosk). Either way, a grouping of restaurants is not considered appealable under Section 30715.

*(emphasis added)*⁴ Given the synonymous nature of “center” and “facility,” the definition of “shopping center” shall be used to establish that a restaurant is necessarily included as an appealable development under section 30715(a)(4) of the Coastal Act. Merriam-Webster defines “shopping center” as “a group of retail stores and service establishments usually with ample parking facilities and usually designed to serve a community or neighborhood.” *(emphasis added)*⁵ Several dictionary sources define “restaurant” as a place or establishment where people from the public pay to sit and eat meals that are served to them.^{6,7,8,9,10} Clearly, to interpret “shopping facility” as not necessarily including restaurants as an appealable development given the definition of the “shopping center,” which is synonymous to “shopping facility” and includes service establishments like restaurants, would lead to an absurd result inconsistent with the enlarged meaning of the term “shopping facility.” This plain reading of the term “shopping facility” further bolsters the Commission’s precedent of treating restaurants as appealable development and supports the purpose of section 30715, noted above, which is to retain appellate jurisdiction over development that is not a principally related to water-oriented and port-related operations.

D-3

Finally, there is no basis to find that a restaurant is a shopping facility that is principally devoted to the sale of commercial goods utilized for water-oriented purposes, and is thus still non-appealable. As noted above, restaurants are establishments that serve food and drinks to people for consumption within the restaurant. The definition of restaurant does not include a description that a restaurant sells goods utilized for water-oriented purposes. [...]

In addition, the Port has identified some components of larger projects as non-appealable (i.e., vista points and Broadway Pier infrastructure improvements within the North Embarcadero Redevelopment Project) within the projects lists included in the PMP; however, in no instance is a restaurant listed as non-appealable when a part of a larger project. In any case, it is factually incorrect to characterize the proposed project as simply a restaurant when it is a complex of eating establishments, of which one does not even contain chairs, and a dock.

Port Master Plan Amendment Required

The subject development is located in the Civic Zone of Planning District 3 of the PMP. The current text and project list in the PMP pertaining to the Civic Zone does not identify redevelopment of the site. While the MND acknowledges that the proposed project will need to be added to the project list, it denies that a PMPA would be required to do so

D-4

⁴ <http://www.merriam-webster.com/dictionary/center>.
⁵ <http://www.merriam-webster.com/dictionary/shopping%20center>.
⁶ <http://www.thefreedictionary.com/restaurant>
⁷ <http://oxforddictionaries.com/definition/english/restaurant>
⁸ <http://www.answers.com/topic/restaurant>
⁹ <http://dictionary.reference.com/browse/restaurant>
¹⁰ <http://en.wikipedia.org/wiki/Restaurant>

Response to Comment D-4: The MND does not acknowledge that the proposed project needs to be listed in the PMP. Rather, it is expressly stated that the project is non-appealable and thus, is not required to be added to the project list (IS page 60). The MND does not state that adding the project to the list would not require a PMP amendment. To clarify in response to this comment, page 60 of the Initial Study/MND has been revised as follows:

“The proposed development type is not listed as ‘appealable’ per Chapter 8 Ports (Section 30715) of the California Coastal Act. As such the proposed project is subject to a non-appealable CDP, and a PMP amendment is not required because non-appealable projects do not need to be added to the project list. Additionally, the proposed project is consistent with the land use designation and PMP text.”

Please also see Response to Comment D-3, which addresses the Coastal Act requirement that only “appealable” projects need to be on the project list and because this is a non-appealable project that is consistent with the identified land use, a PMPA is not required.

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stating "...a PMP amendment is not required to add the proposed project to the project list". However, any modification to the certified PMP, including the addition of a proposed project to the project list, requires a PMPA approved by the CCC. Therefore, a PMPA is required to add the proposed project to the project list with sufficient details and specificity before a CDP can be issued.

D-4

In summary, the project description should be modified to reflect the appealable status of the project and a PMPA will be needed to incorporate the proposed project into the PMP, including addition of the proposed restaurant complex and dock to the Project List for the Centre City Embarcadero Planning District.

D-5

Finally, we respectfully request notice of any future action taken on the subject project, including the final environmental document and final action on a CDP.

D-6

Water Coverage

MND Table ES-1, Existing and Proposed Project Features Comparison, shows the Building Gross Water Coverage increasing by 1,675 sq. ft. Mitigation Measure Bio-4 identifies the proposed mitigation for the increase in water coverage:

Prior to the commencement of construction activities, the loss of 4,480 square feet of open water associated with the proposed project shall be offset by implementing design modifications, such as incorporating translucent areas, to reduce shading and by deducting an amount from the District's shading credit program established pursuant to Board Policy 735 equivalent to that of the proposed project's final shading total (i.e., less any reductions achieved by design modifications) to the satisfaction of NMFS and USACE.

D-7

One of the primary impacts of increased open water coverage is reduced foraging habitat for birds. While translucent areas may be appropriate to offset shading impacts, they do not mitigate the obstruction of foraging opportunities and are not an appropriate form of mitigation for open water coverage.

In addition, Board Policy 735 allows for land, water area, natural or constructed habitat to be used as credit for open water coverage mitigation. However, because a restaurant is not a coastal dependent use, the only appropriate mitigation for an increase in overwater coverage is to decrease an equal amount of overwater coverage by removing an existing structure that currently covers the bay. Commission staff recommends that this project be redesigned to avoid an increase or even reduce the open water coverage of the existing development; however, if the project proponent insists on increasing open water coverage, the MND should clearly identify and describe where an existing overwater structure would be removed in order to offset that increase.

Response to Comment D-5: Please see responses D-2 through D-4. An appealable CDP and a PMPA are not required for the proposed project.

Response to Comment D-6: California Coastal Commission staff have been added to the notification list for the final MND and the final action on the CDP.

Response to Comment D-7: Attachment A, Initial Study, of the Draft MND (Initial Study page 22) and Appendix 3, Biological Technical Report, of the Initial Study clearly identify results of field observations. The water surrounding the proposed project site ranges from approximately 19 to 25 feet deep, and the site does not support suitable habitat for animal residence or foraging. Nonetheless, impacts are identified for increased turbidity during construction that would further reduce the limited foraging opportunities due to the proposed project's proximity to California least tern nesting sites at the San Diego International Airport. No significant adverse impacts are identified as a result of the expanded use and water coverage at the proposed project site as the increase in bay coverage represents less than 1/1,000 of 1 percent of the Bay (see page 23 of the Initial Study).

Mitigation Measure BIO-4 requires a 1:1 deduction of shading mitigation credits for the project's final shading/water coverage total to ensure impacts are less than significant. This approach is consistent with past mitigation by the District; for example, the BAE Systems Pier 4 Replacement Project Environmental Impact Report included Mitigation Measure BIO-7, which required the same mitigation ratio for bay coverage impacts. Credits will be deducted prior to any increase in water coverage resulting from the proposed project. As such, the mitigation measure BIO-4 has been revised as follows:

"BIO-4: Prior to the commencement of construction activities that would result in increased water coverage, the loss of 4,480 square feet of an amount equating to the loss of open water associated with the proposed project shall be offset by implementing design modifications, such as incorporating translucent areas, to reduce shading and by deducting an amount from the District's shading credit program established pursuant to Board Policy 735. Additionally, the project applicant shall implement design modifications, such as incorporating translucent areas over the water. The deduction to the District's shading credits shall be equivalent to that of the proposed project's final increase in shading total (i.e., less any reductions achieved by design modifications) to the satisfaction of NMFS and USACE. Applicant shall pay to the District fair market value, as determined by a District study of similar credits, for the shading credits."

Board Policy 735 and the Coastal Act do not constrain the use of mitigation "credits" to only costal dependent uses. Section 4 of the policy allows for consideration of District mitigation property to be made available to specified, non-District projects that demonstrate exceptional public benefits.

(response continued on following page)

Page Intentionally Left Blank – Continuation of Response

Response to Comment D-7 (continuation from previous page): An evaluation team comprised of staff from the Planning & Green Port and Real Estate Development departments reviewed and evaluated the proposed project and believes it demonstrates exceptional public benefits through improved public access and recreational opportunities, including the use of a proposed public perimeter walkway, public docking structure, and second-story public viewing deck. The proposed project includes additional public dock space and public walkway for general use, resulting in a slight increase in over water coverage from existing conditions. Indeed the increased over water coverage that would result from the proposed project would be 4,480 square feet, of which 100 percent results from the additional area dedicated to the public dock and the public perimeter walkway (a total increase of 4,915 square feet). The proposed project applicant intends to use District shading credits to mitigate any potential environmental impact that an addition of over water coverage may have. As the proposed project design would require approximately 4,480 square feet area of mitigation, and as the total shade ledger available bay-wide is currently 218,709 square feet, the proposed project would have a minimal impact on the total ledger available and would likely not affect the District's ability to mitigate for its own major maintenance or capital improvement projects moving forward. The proposed project meets the administrative requirements of the policy, as detailed below.

- The proposed project applicant has made a good faith effort to minimize the need for mitigation property by reducing impacts through proposed project design. The proposed project design will replace 23,850 square feet of overwater structure with 28,330 square feet, a net increase of 4,480 square feet of overwater structure, which is all accessible to the public. The proposed project includes an increase of 4,915 square feet dedicated to increased public access directly over the water in the form of the public dock and the public perimeter walkway.
- The proposed project applicant has made a good faith effort to self-mitigate within the limits of the leasehold by incorporating sustainable design and planning ideas into the overall site layout.

The District and the proposed project are consistent with this policy as mitigation credits will be deducted for all increase in water coverage associated with the exceptional public benefits associated with the public access improvements of the proposed project and the credits will be exercised at the time of project approval.

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Parking

Commission staff is concerned that the MND and its Appendix 8 Transportation Impact Analysis does not seriously consider the effect that the proposed project will have on the already impacted area in regards to parking and in turn, the impact on access to the bay and waterfront. In addition, the MND incorrectly defines and calculates the parking problem, need, and mitigation requirements. More specific comments on parking are provided below:

D-8

- MND Transportation/Traffic (Parking) Section, Existing Conditions, describes the available public transportation in detail; however, it does not include any description of available parking in the project area. The Port has released numerous studies recently documenting the lack of parking in the North Embarcadero area and the subject environmental document should include a detailed discussion of the findings from those parking studies in order to adequately assess the potential impacts of an expansion of the existing restaurant use in this area.

D-9

- Mitigation Measure TRA-2 requires parking management strategies be implemented to mitigate the projected parking deficiency. These strategies include coordination with ACE parking and transportation companies such as Uber and Lyft, wayfinding signage, valet parking, water taxi, bike racks and share stations, website promotion of public transportation, participation in the Big Bay shuttle, and employee off-site parking. Given the deficit of parking in the area, the project proponent is encourage to expand on these mitigation measures to maximize use of alternative transportation and provide employee public transportation subsidies, secure bicycle racks and showers for employees that choose to commute by bike, and promotional offerings to patrons that use alternative transportation.

D-10

Appendix 8: Portside Pier Transportation Impact Analysis comments:

- Table 8.2 displays the maximum number of parking spaces required for the project, based on the net increase of square footage between the existing site and the proposed project. While the Tidelines Parking Guidelines do allow this calculation for projects that *"involve expansions or modifications of existing uses,"* the subject project is not an expansion or modification of an existing use, as the existing site will be completely demolished and an entirely new development with multiple restaurants will be constructed in its place. Thus, the parking space calculation should be revised based solely on the new development that is proposed.

D-11

Additionally, the Parking Rate Adjustments in Table 8.1 include a parking space credit/reduction for Dedicated Water Transportation Service due to the inclusion of ten boat slips as a project feature. However, the Tidelines Parking Guidelines state that this adjustment is to apply to uses that are *"... adjacent to or provide a*

D-12

Response to Comment D-8: The Draft MND includes a technical analysis of the parking conditions in the area and impacts from the proposed project using the existing conditions as the baseline consistent with the requirements of CEQA Guideline Section 15125(a). Responses to specific concerns regarding the parking analysis are provided below.

Response to Comment D-9: A discussion of the North Embarcadero Focused Parking Study findings is included in Section ES.5 and 8.0 of the Traffic Impact Study. There are numerous public parking options in the vicinity of the proposed project site including metered parking, street parking, and paid public parking lots. There are 71 spaces of off-street metered parking available at the parking lot located between North Harbor Drive and the promenade in front of the proposed project site and 13 along the east side of North Harbor Drive. There are 54 two-hour meter and 14 free two-hour parking spaces catty-cornered from the project. Limited amounts of free street parking are available along Ash Street opposite the proposed project site and within 0.5 mile of the proposed project site along Grape Street and portions of North Pacific Highway. There are over one thousand spaces in public parking lots including the parking lots located at the Portman Hotel, 610 West Ash Street, 410 West Ash Street, and 1230 Columbia Street also within 0.5 mile of the proposed project site.

Response to Comment D-10: In response to this comment, mitigation measure TRA-2 has been revised to include public transportation subsidies for employees. Bicycle racks, as requested in this comment, are already included in Mitigation Measure TRA-2. On-site showers are not included due to space constraints on the site and promotional offerings for patrons using alternative transportation is not included due to comparable measures included in the revised mitigation measure TRA-2 for transit subsidies, contribution to the Big Bay shuttle transit services, and coordination with bike share services.

Mitigation Measure TRA-2 has been revised as follows (additions in underline, deletions in ~~strikeout~~):

“TRA-2: The applicant will implement the following parking management strategies to mitigate the projected parking deficiency:

- Coordination – Ongoing daily coordination between the proposed project and parking lot operators, such as ACE parking, to identify which surrounding lots have available parking at different times of the day.
- Wayfinding Signage – Provide changeable signage to direct patrons to the parking facilities (as identified by ACE on a weekly basis) that have parking availability.
- Transportation Network Companies – Coordination with companies (such as Lyft, Uber, etc.) to encourage patrons to utilize this mode of transportation as an alternative to driving their personal vehicle.

(response continued on following page)

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Response to Comment D-10 (continuation from previous page):

- Valet Parking – Secure 974~~9~~ parking spaces (Secured Parking) at one or more parking lots and provide a valet service in order to avoid overflow in the immediate surrounding parking areas. Prior to Certificate of Occupancy, the applicant will enter into a contract or agreement with a parking operator or equivalent entity securing the Secured Parking and provide the agreement to the District. The agreement shall be updated on an annual basis with proof of said agreement being submitted to the District on an annual basis. Alternatively, the applicant may submit evidence to the District that it has acquired the Secured Parking at an off-site location for the valet parking operation.

After the first year of operation or anytime thereafter, the applicant may submit a parking study (Parking Study) to the District for its review and approval. The Parking Study shall include, at a minimum, the number of Secured Parking used for its valet operations on a monthly basis, broken down into morning, afternoon, and evening timeframes, for the previous year. Based on the District's review of the study, the number of Secured Parking may be reduced for a maximum period of two years. The reduction in Secured Parking shall not be less than the highest monthly use of the Secured Parking in the previous year and the reduction may be granted in the District's sole and absolute discretion. Prior to the elapse of the two-year period, a new Parking Study may be submitted to the District for its review and approval based on the same requirement stated herein. If a new Parking Study is not submitted to the District or during the District's review of the new Parking Study (if said review overlaps with the two-year period), the applicant shall secure 979 parking spaces with a parking operator or equivalent entity through an agreement that shall be submitted to the District.

- Water Taxi – Applicant shall coordinate ~~Coordination~~ with a water taxi company to encourage patrons to utilize water taxis as an alternative to driving their personal vehicle.
- Bike Racks – Provide bike racks on the project site or adjacent thereto on the promenade to encourage employees/patrons to bike to the proposed project.
- Bike Share Stations – Coordinate with companies like DECOBIKE to ensure a bike share station is maintained within walking distance (approximate 1,000 feet) to the proposed project.
- Public Transit – On the applicant's website, promote and encourage employees and patrons to utilize alternative modes of transportation as an alternative to driving their personal vehicle.
- Public Transit Subsidies for Employees – Provide reimbursement or subsidies for public transportation costs for all employees.
- Big Bay Shuttle – Participate in the District's ongoing shuttle program.

(response continued on following page)

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Response to Comment D-10 (continuation from previous page):

- Employee Off-Site Parking – Designate an off-site parking lot for employees and provide shuttle service between the off-site facility and the proposed project, such as:
 - ~~Wyndham Hotel: (+400 stalls)~~
 - Portman Hotel: (+400 stalls)
 - ~~Navy Pier Lot: (+350 stalls)~~
 - 610 West Ash Street: (+410 stalls)
 - 410 West Ash Street (+510 stalls)
 - 1230 Columbia Street (+228 stalls)”

Response to Comment D-11: The project is an expansion or modification of an existing use. There appears to be confusion in the comment regarding the structure versus use. While the existing structure would be demolished and a new one constructed as described in the Draft MND, the existing use – restaurant (currently three restaurants and a coffee kiosk) would be modified or expanded (three restaurants and a gelato walk-in). Thus, the proposed project is not a new use and Table 8.2 is accurate as presented in the Draft MND and Appendix 8, Traffic Impact Analysis, of the Initial Study. The proposed project would be considered an increase in square footage. It is important to note that when the baseline counts were conducted, the restaurant uses were still operational and, therefore, included in the existing demand. Ignoring the baseline conditions – the physical environment as it existed at the time the environmental analysis commenced (here, the three restaurants and a coffee kiosk) - would result in exacerbating the impact, an overestimation of demand and potentially mitigation measures that would not be roughly proportional to the impact, which would be illegal. (*Dolan v. City of Tigard*, 512 U.S. 374 (1994); see also CEQA Guidelines §15125(a).).

Response to Comment D-12: The “Dedicated Water Transportation Service” credit would be attributed to both the proximity of the dock-and-dine facility suitable for use by boat owners and water taxis (as further prescribed in mitigation measure TRA-2) and the adjacent Coronado – Broadway Ferry landing located at the Broadway Pier which is less than a quarter-mile away from the proposed project. This is consistent with the District’s parking guidelines, which allows the adjustment for facilities that “are adjacent to or provide a dedicated water taxi or ferry service that operates in a manner which would offer an alternative to using an automobile to reach the site.” Tidelands Parking Guidelines, 2001, Table 2 footnote 8. While mitigation measure TRA-2 does not require the applicant to provide a water taxi service, it does require the applicant to coordinate with a water taxi company and encourage its use.

dedicated water taxi or ferry service that operates in a manner which would offer an alternative to using an automobile to reach the site.” While the proposed boat slips would allow guests with private boats to dock and dine, this parking rate adjustment is not appropriate unless the project includes implementation of a dedicated water taxi or ferry service to and from the restaurant. If the applicant proposes to use this adjustment, it should be clear in the MND that a water taxi or ferry service is proposed as part of the project and that a portion of the 10 boat slips will be dedicated for water taxi/ferry service use and not available for the docking of private boats. Alternatively, the Port could adjust and justify any proposed parking credit, such as deducting one parking space requirement for each boat slip proposed.

D-12

In accordance with comments above, Commission staff has recalculated the parking requirements below, based on the entire square footage of the new building without the adjustment for the Dedicated Water Transportation Service:

Restaurant¹¹: 37,225 k.sq.ft. x 9.3 = 346.19 spaces

Proximity to Public Waterfront Amenities for Public Access: 346.19 spaces x 0.25 increase = 86.55 space increase

Proximity to Transit: 346.19 spaces x 0.12 reduction = 41.54 space reduction

Total Required: 346.19 spaces + 86.55 spaces – 41.54 spaces = 391 spaces

The 391 required spaces is significantly more parking than the original 84 required spaces calculated in the MND; and, as such, the analysis and mitigation discussions in the MND should be revised accordingly.

D-13

- The Transportation Impact Analysis states that ACE estimates that over 1,000 stalls sit empty at its parking garages every day, and has committed to providing those spaces for this project. However, the data provided for the estimates in the Port’s North Embarcadero Focused Parking Study were also provided by ACE and show a significant deficit. This discrepancy must be addressed. It should also be clear that the parking spaces that are reserved for restaurant employees and patrons are available during both peak and non-peak times. All deficiencies in parking availability should also be addressed.

D-14

In addition, a discrepancy exists between the availability of specific lots included in the MND and the North Embarcadero Focused Parking Study. Specifically, the MND suggests the following lots could be used as mitigation for lack of employee parking and also could be used to calculate available parking for the project, while the North Embarcadero Parking Study finds that these lots will not be fully available at the time the project is constructed:

D-15

¹¹ Dock not included. Guidelines state that the area should include the gross area of the building footprint so restaurant and public deck account for total gross area (33,577 sq.ft. + 3,648 sq.ft.=37,225 sq. ft.).

Response to Comment D-13: The commenter's recalculations presented do not account for the existing facility which is currently driving parking demand and thus as presented in the Draft MND, it is only the delta or increase of the proposed project over the existing facility that drives new or additional demand for parking. As explained in the prior responses (11 and 12), the following calculations shown in Table 8.1 and 8.2 are consistent with the Tidelands Parking Guidelines. However, revisions to the Draft MND or Appendix 8, Traffic Impact Analysis, of the Initial Study due to restaurant square footage changes: The building floor area increased from 33,577 square feet in the Draft MND to 34,069 square feet in the Final MND; therefore, the net increase has changed from 8,722 square feet to 9,214 square feet. This is due to an increase in the kitchen floor area to better meet health and safety standards. The increase in kitchen floor area was achieved through rearranging the layout of the building and expanding the kitchen into previously unutilized space. The overall building footprint and water coverage did not change. The following calculations present the updated parking, which has also been adjusted in the Final MND and the Traffic Impact Analysis. The Traffic Impact Analysis' trip generation calculation and greenhouse gas emissions calculations were also updated to account for the increase in floor area. The increase did not result in a change in the conclusions of the analyses for traffic or greenhouse gas emissions.

Existing Restaurant: 24,855 sq. ft.

Proposed Restaurant: 34,069 sq. ft.

Increase (delta) in square footage: 9,214 sq. ft.

Parking Spaces Required Based on ULI Shared Parking Rates (Unadjusted): $9.214 \text{ ksf} \times 9.3 = 85.69$
~ **86 parking spaces**

Parking Spaces Required Based on ULI Shared Parking Rates (Adjusted): $9.214 \text{ ksf} \times 9.6 = 88.45$ ~
88 parking spaces (3% increase)

Parking Rate per Table 1 of the Tidelands Parking Guidelines: 9.3 parking spaces per KSF

Adjustments for Proximity to Transit per Table 2 of the Tidelands Parking Guidelines: The proposed project is located within 0.25 mile of Santa Fe Depot: -12% reduction = $9.3 \text{ spaces} \times 0.12 = -1.1$ parking space reduction

Adjustments for Proximity to Public Waterfront Amenities for Public Access per Table 2 of the Tidelands Parking Guidelines: The proposed project is located along the waterfront and has direct access to the Embarcadero Promenade: 25% increase = $9.3 \text{ spaces} \times 0.25 = +2.3$ parking space increase

Dedicated Water Transportation Service: The proximity of the dock-and-dine facility suitable for use by boat owners and water taxis and the adjacent Coronado – Broadway Ferry landing located at the Broadway Pier which is less than one quarter-mile away from the proposed project: -10% reduction = $9.3 \text{ spaces} \times 0.10 = -0.9$ parking space reduction

Total Parking Adjustment Percentages: $100\% - 12\% + 25\% - 10\% = 103\%$ or 3% increase

Total Parking Adjustment Rate: $9.3 - 1.1 + 2.3 - 0.9 = 9.6$ parking spaces per KSF. Therefore, parking calculations are correct as presented in the Draft MND. However, Mitigation Measure TRA-2 has been revised to require the applicant to secure off-site parking for its valet operations and employees.

Page Intentionally Left Blank – Continuation of Response

Response to Comment D-14: The parking lots identified in the Portside Pier project Traffic Impact Study as having parking availability for patrons is specifically based on ACE's letter of commitment and are different from those included in the North Embarcadero Focused Parking Study. Please refer to Section 8.2 of the Traffic Impact Study.

Nonetheless, to ensure the required parking is secured prior to occupancy of the restaurant, the valet parking requirement included in TRA-2, has been revised, as detailed in response to comment D-10, to state:

- "Valet Parking – Secure 9749 parking spaces (Secured Parking) at one or more parking lots and provide a valet service in order to avoid overflow in the immediate surrounding parking areas. Prior to Certificate of Occupancy, the applicant will enter into a contract or agreement with a parking operator or equivalent entity securing the Secured Parking and provide the agreement to the District. The agreement shall be updated on an annual basis with proof of said agreement being submitted to the District on an annual basis. Alternatively, the applicant may submit evidence to the District that it has acquired the Secured Parking at an off-site location for the valet parking operation.

After the first year of operation or anytime thereafter, the applicant may submit a parking study (Parking Study) to the District for its review and approval. The Parking Study shall include, at a minimum, the number of Secured Parking used for its valet operations on a monthly basis, broken down into morning, afternoon, and evening timeframes, for the previous year. Based on the District's review of the study, the number of Secured Parking may be reduced for a maximum period of two years. The reduction in Secured Parking shall not be less than the highest monthly use of the Secured Parking in the previous year and the reduction may be granted in the District's sole and absolute discretion. Prior to the elapse of the two-year period, a new Parking Study may be submitted to the District for its review and approval based on the same requirement stated herein. If a new Parking Study is not submitted to the District or during the District's review of the new Parking Study (if said review overlaps with the two-year period), the applicant shall secure 979 parking spaces with a parking operator or equivalent entity through an agreement that shall be submitted to the District."

Response to Comment D-15: In response to this comment, the Traffic Impact Study and analysis in the MND have been revised to remove the Wyndham and Navy Pier lots from the long-term parking supply. The analysis in the Draft MND is not reliant on any one specific parking lot having available spaces; rather, the abundance of parking options that exist and the commitment to parking options and reduction strategies described in mitigation measure TRA-2 would ensure adequate parking for the proposed project. The revisions to remove the Wyndham Hotel and Navy Pier parking lots from Section P. Transportation/Traffic (Parking) of the Initial Study, mitigation measure TRA-2, and to Appendix 8 Traffic Impact Analysis of the Initial Study do not amount to a substantial revision under CEQA (CEQA Guidelines §15073.5) because they do not show any new significant environmental impacts, any substantial increase in the severity of environmental impacts, or any new mitigation measures. Therefore, recirculation is not required.

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August 31, 2016
Page 8

- Wyndham Hotel: North Embarcadero Focused Parking Study states that these spaces are only available during low parking demand at the hotel.
- Navy Pier: North Embarcadero Focused Parking Study includes the elimination of most of the parking on Navy Pier in the near-term.

Again, this discrepancy should be addressed. Neither the Wyndham Hotel nor Navy Pier should be relied upon in the calculation of available parking for the subject project.

↑
D-15

Public Access – Operation

The proposed restaurant complex will be located on public land. As such, it is essential that public access is clearly provided at the site. While we appreciate the inclusion of a free public viewing deck, we continue to be concerned that maintaining the entrance of the public deck through the interior of the restaurant building and requiring the public to enter the restaurant to access the public deck, instead of providing a direct entrance from the public promenade, will be a deterrent for public use and discourage use of the deck. As recommended at our May 4, 2016 meeting with Port staff and the project proponent, the project should be redesigned so that the entrance to the public deck is accessible from the public promenade to provide maximum access to the public.

D-16

In addition, at our May 4, 2016 meeting, the subject project was presented with a continuous public walkway around the perimeter of the ground floor. It is unclear if the feature has since been removed, as the floor plans in Figure 4a of the MND instead shows seating around the perimeter of the ground floor. The inclusion of a continuous walkway design around the perimeter of the building platform is necessary to increase coastal access at the site and recapture public views. Any public space should also be separate from private areas so that the public feels welcomed and not as if they are intruding in the private restaurant space.

D-17

The project proponent is also encouraged to maximize public access to the public deck and walkway by allowing public access from dusk until dawn and during hours of operation. Please include in the MND the hours the public will be able to access the deck, as well as the hours of operation for the five eating establishments included in the project.

D-18

Finally, the MND states that signage will be used to direct the public to the public viewing deck. Please provide additional information on public access signage in the MND, including the placement of signs and if signs will also be used to direct the public to the ground floor perimeter walkway.

D-19

Response to Comment D-16: In response to this comment the applicant has agreed to further improve public access provisions that include an elevator providing access directly from the promenade level to the public viewing deck at the south end and cleared perimeter walkway (see revised Figures 4a, 4b, 5b, and 5d). These provisions would result in an approximately 492-square-foot increase to the building but would not result in changes to the building, footprint, height or seating capacity, and will be reflected in the proposed non-appealable CDP. The provisions further improve public access to the bayfront, which would be increased by the proposed project compared to existing conditions due to the inclusion of a public viewing deck and perimeter walkway. As discussed in Section J., Land Use and Planning, of the Draft IS/MND, the District determined that the proposed project would have no impact on land use, including coastal access, as the existing conditions provide far less direct coastal access and the proposed project would include a perimeter walkway and public viewing deck. Thereby, these revisions serve to further amplify the beneficial impacts to coastal access of the proposed project and would not alter the conclusions in the MND.

The revised information serves to clarify or amplify the information already presented in the Draft MND in response to comments and does not amount to a substantial revision under CEQA (CEQA Guidelines §15073.5) because it does not show any new significant environmental impacts, any substantial increase in the severity of environmental impacts, or any new mitigation measures. Therefore, recirculation is not required.

Response to Comment D-17: Figure 4a has been revised to show a continuous public walkway around the perimeter of the ground floor, consistent with Figure 6 of the Draft MND, which was the intent of the proposed project. Draft MND Figure 6 was removed from the final document because Figures 4a and 4b were updated to include the coastal access routes. Therefore, Figures 4a and 4b have also been updated to include public access routes, the new elevator, revisions to the second level public viewing deck, and locations of public access signage. Clarifying language has been added to Section II., Project Description, of the Final MND has been added as follows (additions in underline):

“Additionally, a perimeter walkway around the bottom floor of the building would be open to the public to provide views of the bay. Clear signage would be provided directing the public from the North Embarcadero Promenade to the public viewing deck and to the perimeter walkway (see Figure 4a).”

Additionally, this project revision will be reflected in the proposed non-appealable CDP. This project revision does not require recirculation of the Draft MND as it does not constitute a substantial revision to the MND. The project proposed a continuous public walkway around the perimeter of the ground floor, as shown on the Draft MND Figure 6, and this is just a clarification as Figure 4a in the Draft MND inaccurately depicted restaurant seating at the edge of this walkway. Figure 4a has been revised to include the coastal access on the ground floor and Figure 4b has also been updated to include the second-floor public access. Together the revised Figures 4a and 4b replace Figure 6, which has been eliminated in the Final MND.

Page Intentionally Left Blank – Continuation of Response

Response to Comment D-18: For safety and security reasons, the public viewing deck and perimeter walkway would not remain open from dusk until dawn. However, the public viewing deck and walkway would remain open during business hours of the restaurant, which would generally be between 6:00 a.m. and 10:00 p.m.

Response to Comment D-19: The floor plans have been revised and provided in the Final MND figures to include locations of the wayfinding signage, and example signage that would direct the public to the viewing deck and perimeter walkway. The Coastal Access Plan has been incorporated into revised Figures 4a and 4b, to show the increased public coastal access and signage, in the Final MND, and these changes will be reflected in the proposed non-appealable CDP. The revised information serves to clarify or amplify the information already presented in the Draft MND in response to comments and does not amount to a substantial revision under CEQA (CEQA Guidelines §15073.5) because it does not show any new significant environmental impacts, any substantial increase in the severity of environmental impacts, or any new mitigation measures. Therefore, recirculation is not required.

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Public Access – Construction

In addition, the proposed project construction and demolition schedule includes work on Saturdays and during summer months. This is a high traffic, visitor-oriented area with key access components. How is the construction schedule designed to accommodate the public?

D-20

Lighting

The project description of the MND describes the lighting associated with the project, which includes:

- Backlit illuminated signage on the waterside- and promenade-facing frontages of the building to display the names and/or logos for Miguel's Cocina, Ketch Grill & Taps, Brigantine Seafood and Oyster Bar, Portside Gelato & Coffee, and Portside Pier. Signs would range in size from 12 to 43 feet in length and from 3 feet, 2 inches to 12 feet, 11 inches in height. Five signs would face the promenade and five would face the water.
- LED panels along the North Embarcadero Promenade and along the upper deck on the waterside-facing frontage of the building to display upcoming events, menu specials, and other notifications.
- LED illuminated "baskets" surrounding the building. It appears that there are two baskets.
- LED light tube strips on the promenade-facing frontage of the building.
- An internally-illuminated sculptural centerpiece on the outdoor bar of The Brigantine's second floor, for artistic purposes.

D-21

Historically, the Commission has been concerned that this type of lighting and signage may adversely impact scenic resources and viewsheds to and along the bay, add to general visual clutter, and be out of character with the surrounding development. In the case of the proposed development, it appears that these concerns are substantiated. The large amount and size of individual signs and lights on the single two-story building will be overwhelming visually, especially as the signage will be advertisement seen from both land and water. Collectively, the building will emit an amount of light that is likely to distract from views of the bay. Finally, the signage and lighting would far exceed that associated with the current building and of neighboring buildings and would not be in character with the surrounding development.

Sea Level Rise

The project has analyzed sea level rise for the structure over a 50 year period, and states

D-22

Response to Comment D-20: The MND describes construction and demolition activities under Section II, Project Description. The construction schedule is currently anticipated to occur over approximately six months, including summer months.

The construction plans include, as shown in Figure 8 of the Draft MND, accommodating clear and safe public access along the promenade. During construction, the portion of the promenade that travels through the proposed project site would not be accessible to the public, and pedestrians would be rerouted through the proposed project site between the K-Rail and perimeter/pedestrian barricade fencing, as indicated in Figure 8, Project Construction Area. Therefore, pedestrians could still walk along the North Embarcadero Promenade and through the proposed project site during construction, and all existing access conditions would be reinstated upon completion, resulting in no impact to public access during construction.

Response to Comment D-21: As stated in the Draft MND, the illuminated signage and sculptural pieces are not anticipated to light the greater surrounding area. An illumination of public waterfront areas furthers the District's goal of activating the waterfront as it would attract more users along the North Embarcadero Promenade after dark. The proposed illumination allows for safe nighttime walking through the proposed project site. Also, the intent of the signs and lighting is not to create visual clutter or detract from the building's architecture, which is intended to be distinctive and instantly recognizable itself regardless of the signage. The lighting is not considered a detraction of views of the bay and would not be out of character with the surrounding development. Indeed many promotional materials depicting the bay at night highlight the existing lighting around the bay and the reflections thereof as a signature feature of nighttime bay views. Additionally, the Draft MND expresses the worst case scenario (e.g., it describes the most signage and highest lighting contemplated for the proposed project).

While the District does not consider the proposed lighting to be overwhelming, in response to this comment, a photometric assessment (included as Appendix IV, Portside Pier Photometrics, to the responses to comments) has been developed to quantify the proposed project's brightness and area of lighting in context and comparison with other facilities within the surrounding area. The photometric graphic shows the amount of light (in foot-candles) at locations immediately adjacent and surrounding the proposed project site. As shown in Appendix IV, the lighting resulting from the proposed Portside Pier site would be consistent with the nearby Hornblower/Visitor Information Center lighting. As noted in the photometric graphic, the brightest lighting is actually resulting from the dining areas and not the illuminated signage or LED strips. The North Embarcadero Promenade immediately outside of the proposed project would be illuminated by the proposed project at night to between one and three 1 and 3 footcandles, which is acceptable for nighttime walking, with the exception of select areas located just outside of the open-air dining areas, which would reach to between 3 and 6 footcandles (note that lighting above 6 footcandles is acceptable for dining). Thus, the proposed project would not impact the nighttime views or visitor experience along the North Embarcadero Promenade as it would not be overwhelming with respect to the surrounding area. Additionally, the District will reflect in the project description of the CDP that the lighting used will not exceed 9.2 footcandles at the edge of the North Embarcadero Promenade or 6.3 footcandles at the edge of the first-floor bayside deck, and be limited to the specifications provided in the photometric plan. The text in the Final MND project description on page 5 has been revised to include the following text:

"Levels of lighting spill would be comparable to that from existing lighted facilities along the North Embarcadero Promenade, not exceeding 9.2 footcandles at the edge of the North Embarcadero Promenade or 6.3 footcandles at the edge of the first floor bayside deck, and be limited to the specifications provided in the photometric plan (see Appendix IV of Attachment D)."

Page Intentionally Left Blank – Continuation of Response

Response to Comment D-22: A 50-year project lifespan represents a worst-case scenario in terms of sea level rise because it represents the longest length of the proposed lease term, which will include a requirement for the removal of the facility at the end of the lease period at the District's discretion. This life span is reasonable as the existing restaurant building at the proposed project site is currently 51 years old (constructed in 1965), and will be demolished at the end of its lease term, which is January 31, 2017. Moreover, any new tenant or lease would be required to undergo a separate CEQA review once the existing lease has expired. The proposed project is not anticipated to be in operation 75 years following its opening, as this comment suggests. Regardless, sea level rise estimates for a 75-year lifespan are discussed in the following paragraph.

The base elevation of the proposed project's structure would be approximately 120 inches (10 feet) above the Mean Lower Low Water (MLLW) at the site. The highest high tide recorded for the San Diego Bay is 93.5 inches (7.79 feet) above the MLLW. As discussed in the MND, using the linear interpolation method in Appendix B of the CCC's Adopted Sea Level Rise Guidance, the sea level rise at year 2068 (a 50-year project lifespan) would range to between 9.3 and 39.1 inches. At the lower end of this range, the structure would not be affected; however, the sea level would be approximately 12.6 inches (1.05 feet) above the base level of the structure at the higher end of the range. However, the proposed project structure is anticipated to be able to withstand extreme high tides and wind and wave action. Additionally, the proposed project is designed to use materials to withstand sea level rise impacts and can be retrofitted prior to high tides and waves reaching the base of the structure. This will be included in the CDP to allow the District to ensure that the appropriate design or adaptive management techniques are implemented as proposed by the Applicant. Therefore, impacts would be less than significant (Initial Study page 57).

Under a 75-year lifespan of the proposed project, using the same linear interpolation method, the sea level would rise between 15.32 and 60.12 inches by the year 2093. Therefore, at year 2093, the structure would not be affected at the lower end of this range, but the sea level would be approximately 33.62 inches (2.8 feet) above the base level of the structure under the higher end of this range. Once again, the proposed design and materials—such as constructing the deck and ground-floor windows and doors of the structure to be water tight—would avoid inundation under the worst-case sea level rise scenario at year 2093. Therefore, while the proposed project is not anticipated to be in operation longer than its 50-year lease term, if it were to operate 75 years following construction, it is still anticipated to have a less than significant impact associated with sea level rise.

Furthermore, to clarify the determination of less than significant impacts; even if the proposed project were inundated, it would not result in the significant loss, injury, or death as the instances where inundation could potentially occur would be for relatively short periods during the peak of high tide and recede as the tides ebbs, the times of which are accurately predicted. Therefore, impacts would be less than significant. This revised information serves to clarify or strengthen the information already presented in the Draft MND in response to comments and does not amount to a substantial revision under CEQA (CEQA Guidelines §15073.5) because it does not show any new significant environmental impacts, any substantial increase in the severity of environmental impacts, or any new mitigation measures. **(response continued on following page)**

Portside Pier Restaurant Project
August 31, 2016
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"The project life is expected to be 30 to 50 years based on the proposed project lease with the District and the life expectancy of materials in the marine environment." The life of the structure should not be tied to the lease of the project as its length is based on legal and not physical circumstances. It is also unclear what evidence there is for the life expectancy of materials in the marine environment. The current building was constructed in 1965, over 65 years ago and is still in operation and considered safe. The project should instead be analyzed based on a 75 year life as recommended in the Commission's Adopted Sea Level Rise Guidance¹². In addition, any adaptive management strategies should be considered prior to the development of the project, and the development of adaptive strategies should not be deferred to 2058 as the MND suggests.

↑
D-22

Alternatives Analysis

Finally, the MND fails to discuss alternatives to the proposed project. Considering the noted parking deficits and the large increase in open water coverage, the Port should analyze and discuss a reduced-project alternative, at least, in the final environmental document.

D-23

Thank you again for the opportunity to provide review and comment on the proposed project. If you have any questions or require further clarification, please do not hesitate to contact me at the above office.

D-24

Sincerely,



Melody Lasiter
Coastal Program Analyst

Cc (copies sent via e-mail):
Sherilyn Sarb (CCC)
Deborah Lee (CCC)
Kanani Brown (CCC)

¹² <http://www.coastal.ca.gov/climate/slrguidance.html>.

Response to Comment D-22 (continuation from previous page): Adaptive management is a prudent and effective tool for addressing potential eventualities in the future that are predicted with uncertainty and ranges of possible outcomes such as sea level rise. The adaptive management policy development considered and as disclosed in the Draft MND would be applicable for any renewal or redevelopment of the project beyond 2058 and would not be applicable to the proposed project as they are yet to be developed. The inclusion in the Draft MND is intended to disclose the District's awareness of the long-term issue.

Response to Comment D-23: All impacts have been reduced below a level of significance and, therefore, an EIR and identification of project alternatives to reduce impacts is not required (CEQA Guidelines §15063 and, §15070-15075).

Response to Comment D-24: This is a closing comment. No response is necessary.

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA

7575 METROPOLITAN DRIVE, SUITE 103

SAN DIEGO, CA 92108-4421

(619) 767-2370



February 2, 2017

Ms. Wileen Manaois
San Diego Unified Port District
Real Estate Development
3165 Pacific Hwy
San Diego, CA 92101

Re: EXECUTIVE DIRECTOR'S DETERMINATION ON APPEALABILITY

Coastal Development Permit Application No. 2016-91
1360 North Harbor Drive, San Diego, CA 92101

Dear Ms. Manaois,

On December 13, 2016, the San Diego Unified Port District ("Port") approved Coastal Development Permit ("CDP") Application No. 2016-91 for the demolition of all existing development at 1360 North Harbor Drive, locally identified as Anthony's Restaurant, including a 24,855 sq.ft. building located on a platform over the San Diego Bay and occupied by two restaurants, an event facility and a coffee stand followed by the construction of a 40,805 sq.ft. complex of new restaurants, new platform, new pilings and a new dock called the Portside Pier project. The Port issued the CDP as a "non-appealable" development. As you are aware, Coastal staff objects to the determination by the Port that the project is not appealable to the Coastal Commission. Our office has also made multiple requests to Port staff for issuance of a final notice of local action on the subject project, as required by Section 30717 of the Coastal Act, which we believe is "appealable" so that an appeal period can be commenced.

Specifically, on August 31, 2016, *prior to the Port's approval of the CDP*, Coastal staff provided a comment letter on the draft Mitigated Negative Declaration ("MND") for the Portside Pier project that raised objections to the Port's determination that the CDP for the project would not be appealable to the Commission, and requested a notice of final local action for the CDP. In the Port's response, included in the Final MND as Letter D and received by Coastal staff on December 2, 2016, the Port indicated that it continued to believe that the project was non-appealable, but agreed to provide a notice, stating that "California Coastal Commission staff have been added to the notification list for the final MND and the final action on the CDP."

Based on the Port's response in the MND, all the subsequent exchanges noted herein between our offices and the fact that the Port approved the CDP as "non-appealable", it is our understanding that the Port disagrees with the Executive Director's determination that

EXHIBIT NO. 7

A-6-PSD-17-0003

2.2.17 CCC Dispute
Resolution Letter

1 of 3

California Coastal Commission

the project is appealable to the Coastal Commission. Therefore, we would like to address this dispute at the next Coastal Commission meeting, scheduled for March 8-10, 2017 in Ventura. Commission staff recommends that the Port postpone taking any further action on the subject CDP until the Commission resolves the appealability issue.

In addition, since the Port's approval of the CDP on December 13, 2016, the Port has failed to send a notice of final local action despite several requests by Coastal staff, beginning with an email on January 10, 2017 requesting an update on the status of the project and, if the project had been approved, a notice of the Port's final action. Port staff responded to that email the same day and agreed to send a notice. Since then, we have had multiple communications (1/12/17 phone call; 1/18/17 phone call; 1/20/17 coordination meeting and 1/30/17 email) in which Coastal staff has inquired about the status of the final notice of local action and has asked the Port to send the notice. Port staff has repeatedly indicated that it would be responding; however, the Port has yet to provide the notice of final local action or any response on the question of appealability.

Section 30715(a)(4) of the Coastal Act establishes that the permit authority of the Commission provided in Chapter 7 (commencing with Section 30600) over any new development contained in a certified port master plan shall be delegated to the port governing body, except that approvals of any of the following categories of development by the port governing body may be appealed to the Commission: office and residential buildings not principally devoted to the administration of activities within the port; hotels, motels, and shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes; commercial fishing facilities; and recreational small craft marine-related facilities. The Executive Director has determined that the Portside Pier project includes categories of development that are appealable, as described below, and therefore, the Port's approval of CDP No. 2016-91 is appealable to the Commission.

Commission staff has historically provided direction to the Port that restaurants fall under the category of "shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes" and are therefore appealable under Section 30715(a)(4) of the Coastal Act. Additionally, a restaurant facility, such as the subject project, is not considered to be "principally devoted to the sale of commercial goods utilized for water-oriented purposes." Furthermore, the new dock for the public, specifically patrons of the restaurant complex, is considered a "recreational small craft marina related facility" which is a category of appealable development. Finally, no mention of any redevelopment, a new or expanded restaurant facility or dock improvements are included in the text, figure or project list in the certified Port Master Plan for this site.

Please note that the Port has withheld the notice of final local action for over 33 working days since the Port's approval of the CDP and for over 15 working days since our January 10, 2017 email exchange. If the notice is not received by close of business, Monday, February 6, 2017, Coastal staff will announce and notice the beginning of the 10-working day appeal period. It is crucial that the appeal period required by Section

February 2, 2017

Page 3

30717 is initiated so that the Commission, other interested parties and the public have the opportunity to review the project and file an appeal, and that the applicant receive notice of the appeal period as well. As noted previously, Coastal staff will be soliciting an appeal from the Commission due to concerns regarding the project's consistency with the certified Port Master Plan and the Chapter 3 policies of the Coastal Act – specifically the protection of public access, marine resources and visual resources. As Commission regulations require (section 13112), an appeal, once filed, will stay the operation and effect of the CDP.

Thank you for your attention to these matters. If you have any questions, please contact Melody Lasiter or me at the number listed above.

Sincerely,

A handwritten signature in black ink that reads "Deborah N. Lee". The signature is fluid and cursive, with the first name being the most prominent.

Deborah N. Lee
District Manager

CC (via email): Karl Schwing, California Coastal Commission
Kanani Brown, California Coastal Commission
Robin Mayer, California Coastal Commission
Melody Lasiter, California Coastal Commission
Mike Morton, Jr., The Brigantine, Inc.
Lesley Nishihira, San Diego Unified Port District



SAN DIEGO UNIFIED PORT DISTRICT
OFFICE OF THE GENERAL COUNSEL

February 6, 2017

VIA EMAIL (W/O ATTACHMENTS) AND IN-PERSON DELIVERY

California Coastal Commission
San Diego Area
ATTN: Deborah N. Lee
Melody Lasiter
7575 Metropolitan Drive, Ste 103
San Diego, CA 92108

RE: February 2, 2017 Executive Director Determination on Appealability for the
Portside Pier Project (CDP Application No. 2016-91)

The San Diego Unified Port District (District) is in receipt of the February 2, 2017 letter from California Coastal Commission (Coastal Commission) staff entitled "EXECUTIVE DIRECTOR'S DETERMINATION ON APPEALABILITY," Coastal Development Permit Application No. 2016-92, 1360 North Harbor Drive, San Diego, CA 92101 (February 2, 2017 Letter). The February 2, 2017 Letter asserts that the proposed redevelopment of the existing Anthony's restaurant establishments by The Brigantine, Inc., as the applicant and project proponent (Project), is subject to appeal. As explained in detail herein, the Coastal Act designates the District as the permitting authority for restaurants and this Project is not among the category of projects subject to appeal under the Coastal Act.¹

As you are aware, like Anthony's, the Project involves three restaurants, a coffee and gelato shop, a dedicated public viewing deck, and a dock and dine facility.² As you also are aware through the numerous notices given to the Coastal Commission, the Board of Port Commissioners (District Board) approved a Mitigated Negative Declaration (MND) and authorized issuance of a non-appealable Coastal Development Permit (CDP) for the

¹ The Coastal Act is codified in California Public Resource Code Section 30000 et seq.

² Anthony's includes three restaurants, a walk-up coffee kiosk and a dock.

Project on December 13, 2016. (See Attachment A (District staff report, which includes the Draft Non-Appealable CDP), District Board Resolution 2016-205 and District staff's presentation to the District Board.³)

The February 2, 2017 Letter claims that the proposed Project required an "appealable" CDP because restaurants and dock and dine facilities are appealable under Coastal Act Section 30715. This assertion is contrary to (1) the plain language of Section 30715, (2) the District's CDP Regulations, which were approved by the Coastal Commission, (3) the certified Port Master Plan (PMP), (4) past practices as demonstrated by previously issued CDPs for other restaurants in the District, and (5) a recent court ruling in a case involving both the District and the Coastal Commission.

Coastal Commission staff also insists that the District must issue a notice of final action for the non-appealable CDP. Yet, as also discussed, below, no such notice is required. In any event, Coastal Commission staff had notice prior to the District Board's approval of the Project and thereafter as well.

The establishment of a 10-day appealable period by Coastal Commission staff, institution of an unauthorized dispute resolution process, and the hearing of an appeal of a non-appealable CDP for the Project would each be an action in excess of the authority and jurisdiction granted to the Coastal Commission. Additionally, it may constitute interference with contract and a taking of property rights. Accordingly, the District requests that the Coastal Commission ceases initiation of the appeal period or any process to bring an appeal to the Coastal Commission.

I. Restaurants and Dock and Dine Facilities are Non-Appealable Developments

As stated in the responses to comments to Coastal Commission staff's comment letter on the Draft MND and as discussed in more detail below, the proposed Project is a non-appealable category of development as set forth in by Coastal Act Section 30715, as well as the District's Coastal Act regulations, which were approved by the Coastal Commission. (See Attachment B, Response to Comments and Errata). The certified PMP also supports the fact that restaurants and dock and dine facilities whether or not they are accessory uses, are non-appealable developments. Additionally, the interpretation is supported by the California Superior Court ruling in *San Diegans for*

³ The staff report and draft resolutions can also be found online at:
<https://portofsandiego.legistar.com/LegislationDetail.aspx?ID=2902778&GUID=83CE8ADF-7957-4114-989D-C6B79DDC1B50>

Open Government v. California Coastal Commission; San Diego Unified Port District, Case. No. 37-2013-00057492-CU-TT-CTL (2013) (Restaurant Lawsuit) where the Court found that a restaurant was not an appealable development (see Attachment C.)

A. Restaurants and Accessory Dock and Dine facilities Are Not Appealable Developments Under Coastal Act Section 30715 and the District's Coastal Act Regulations

Section 30715 of the Coastal Act specifies the categories of development that may be appealed to the Coastal Commission. Section 30715(a)(4) states that: "Offices and residential buildings not principally devoted to the administration of activities within the port; hotels, motels and shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes; commercial fishing facilities; and recreational small craft marina related facilities" may be appealable to the Coastal Commission.

Neither restaurants nor eating establishments are listed as appealable in Section 30715 of the Coastal Act. A restaurant is not a "shopping facility." Coastal Commission staff's interpretation would expand appellate jurisdiction well beyond the plain language and intent of Section 30715(a)(4). Specifically, the Legislature used plain terms to describe "office and residential buildings," "hotels," "motels" and it knew how to use a plain term to describe a "restaurant." However, the Legislature did not do so, leaving restaurants as "non-appealable" developments.

A dock and dine facility is also not considered a "recreational small craft marina related facilities."⁴ The certified PMP includes distinct land uses for "recreational small craft marina[s]," which do not include dock and dine facilities. Rather, the PMP includes "Pleasure Craft Marinas" and "Recreational Boat Berthing" uses that allow for longer-term berthing and storage of small recreational crafts, as well as boat rentals, charter and sales, fueling docks, etc. (PMP, p. 20.) In contrast, a dock and dine facility is allowable under the "Commercial Recreation" land use designation in the PMP. (PMP, p. 19.) Dock and dine facilities are not related to marinas, may be used by more than recreational small crafts, and unlike recreational marinas or associated facilities, dock and dine facilities are intended to be used for a short period of time while patrons visit restaurant establishments. (PMP, p. 19 (describing dock and dine facilities as "public boat docks located in proximity to a restaurant . . . where boaters may tie up and

⁴ Coastal Commission staff did not assert in its MND comment letter to the District that the dock and dine facility was an appealable development.

disembark for a short period of time to dine).) In other words, dock and dine facilities are akin to short-term parking lots for boats.

The dock and dine facility is an accessory use to the restaurant establishment and does not change the nature of the restaurant from non-appealable to appealable. This is consistent with the Coastal Commission's position when it certified the San Diego Convention Center expansion Port Master Plan Amendment (PMPA) where the inclusion of retail shops did not convert San Diego Convention Center expansion from a non-appealable development to an appealable development. (PMP, pp. 68-71, 72 (accessory retail uses did not convert the San Diego Convention Center expansion into an appealable development).)

B. The Superior Court, in Litigation Where Both the District and Coastal Commission Were Parties, Clarified that Restaurants are Not Appealable Development

The decision in the Restaurant Lawsuit, challenging a Coastal Commission-issued CDP for the redevelopment of a restaurant by Sunroad, supports the interpretation that restaurants are non-appealable developments. There, Sunroad proposed the redevelopment of a site with a restaurant that was historically developed with a restaurant. The District issued a Coastal Act exclusion/exemption for it but failed to issue the noticed required by Section 30717 of the Coastal Act, which is required for appealable developments and starts the 10-working-day appeal period for exclusions/exemptions. The exemption/exclusion was appealed and after finding a substantial issue, the Coastal Commission conducted a de novo hearing and issued a CDP for the restaurant.

That CDP was subsequently challenged in the Restaurant Lawsuit filed by San Diegans for Open Government, Case. No. 37-2013-00057492-CU-TT-CTL (2013). In response to allegations by the petitioner and the Coastal Commission that a "restaurant" was "appealable" under Section 30715(a)(4) because a restaurant was a type of "shopping facility, and akin to other appealable development," the Court squarely ruled that a restaurant was NOT an "appealable" category of development under the Coastal Act. (Attachment C, p. 3.) Specifically, in response to petitioner's argument that a PMPA was required for the Sunroad restaurant to add it to the appealable project list, the court unambiguously found that "the [p]roject was not an 'appealable' development" and pursuant to Section 30711 of the Coastal Act, the Legislature could have required all projects be listed in a port master plan "but instead expressly stated that only . . . 'proposed projects listed as appealable in Section 30715 be included.'" These were two key grounds for denying petitioner's cause of action.

Additionally, several Coastal Commission Commissioners during the de novo hearing on the Sunroad restaurant rejected the interpretation that restaurants were appealable “shopping facility” developments:

- “[S]hopping facilities not principally devoted to the sale of commercial goods utilized for water oriented purposes is not a restaurant. A restaurant is a restaurant.” (see Attachment B, Appendix II p. 002705 [p. 63 of transcript] (excepts from the hearing transcript of the Sunroad Coastal Commission hearing).)
- I “would have a hard time calling [a restaurant] a shopping facility” and that an “attempt to stretch that definition of a shopping facility is a little too broad for where we should be.” (*Id.* at pp. 002717 – 002718 [pp. 75-76 of the transcript].)
- Staff’s interpretation that a restaurant is an appealable development is “a shortcutting the rules on Section 7015” and such a staff policy of doing so should be reviewed by the California Coastal Commission. (*Id.* at 002720 [p. 78 of the transcript].)

C. The PMP, certified by the Coastal Commission, does not Characterize Standalone Restaurants or Dock and Dine Facilities as Appealable

The District has excluded/exempted eight restaurants and issued non-appealable CDPs for at least two restaurants: the Chart House and the Fish Market, both of which were standalone restaurants like the Project. (See Attachment B, Appendix III.) Importantly, Anthony’s, the existing restaurant proposed for redevelopment by the Project, is not identified as “appealable” in the Port Master Plan. (See PMP, pg. 69.) Some restaurants have been listed as appealable in the PMP or issued an appealable CDP. However, the sole basis for the appealable characterization of such restaurants was the fact that they were a part of a larger appealable category development – like, The Wharf – Point Loma Marina LLC or The Ferry Landing Expansion. This is consistent with the District’s and Coastal Commission’s interpretation that accessory uses take on the appealable or non-appealable category of the primary use (see Section I.A of this letter.) Additionally, the Imperial Beach PMPA, certified nearly 20 years ago in 1997, included unidentified commercial uses on the pier, which could have been considered appealable developments and the District took a liberal approach and identified it as appealable. Subsequently, the court’s decision in the Restaurant Lawsuit clarified that restaurants are not appealable development. The doctrine of *res judicata*

prevents the Commission from re-litigating that issue. *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.

Currently, there are eleven (11) existing dock and dine facilities associated with restaurants within the District located at the Kona Kai Marina, Bali Hai Restaurant, Sun Harbor Marina, Sunroad Resort Marina, Marriott Marquis San Diego, Joe's Crab Shack, Chula Vista Marina, Loews Coronado Bay Resort, Seaforth Boat Rentals, Coronado Ferry Landing, and Pier 32 Marina. Additionally, a dock for restaurant patrons was located at the Anthony's facility. None of them are listed or described as appealable development in the certified PMP (compare PMP, pp. 85 and 113 (Recreational Marina and Marina development listed as appealable). That is because they are non-appealable developments.

Section 7.d(3) of the District's CDP Regulations, approved by the Coastal Commission, state that "non-appealable" developments are those that are not classified as "emergency", "excluded" or "appealable" by the regulations. Appealable categories of development mirror the development categories of Section 30715 of the Coastal Act. While the District has unique "exclusions" in its CDP Regulations, those are inapplicable here because Coastal Act exclusion was not issued for the Project.

II. Section 30717 of the Coastal Act is Not Implicated Because the District Approved a Non-Appealable CDP

Section 30717 of the Coastal Act only applies to "appealable developments" and states that:

[P]rior to commencement of any appealable development, the governing body of a port shall notify the commission and other interested persons, organizations, and governmental agencies of the approval of a proposed appealable development and indicate how it is consistent with the appropriate port master plan and this division. An approval of the appealable development by the port governing body pursuant to a certified port master plan shall become effective after the 10th working day after notification of its approval, unless an appeal is filed with the commission within that time.

For the reasons set forth in this letter and in the record, the Project is not appealable and hence, Section 30717 of the Coastal Act was never triggered.

Additionally, Section 11i. of the District's CDP Regulations specifically states that: "Notice of the action of the Board on a proposed appealable development shall be mailed to the applicant...[and] the Coastal Commission...not later than five (5) working days following the decision of the Board." Since District staff determined that the Project is a non-appealable development and the Board approved a Non-Appealable CDP, the District is not required to send a Notice of Board Action to the Coastal Commission. For non-appealable developments, under the District's CDP Regulations (Section 10f), the District is only required to forward Draft and Final California Environmental Quality Act (CEQA) documents to the Coastal Commission, which, as explained in Section III of this letter, it did for this Project.

III. Coastal Commission Staff was Given Advance Notice of the District Board Actions and District Staff Confirmed the District Board's Approval of a Non-Appealable CDP on January 10, 2017

As the District has provided plentiful notice to Coastal Commission staff about the District Board's action on the subject non-appealable CDP, as detailed, below:

- On December 1, 2016, prior to the December 13, 2016 District Board meeting, District staff emailed Coastal Commission staff its CEQA and Coastal Determination for the Project, for which District staff determined the Project to be a "Non-Appealable development" and that "A Non-Appealable Coastal Development Permit (CDP) must be obtained...." (See Attachment D)
- In Coastal Commission staff's August 31, 2016 comment letter on the Project's Draft MND (Comment D-6), staff "respectively request notice of any future action taken on the subject project, including the final environmental document and final action on a CDP." In response to this comment, District staff stated that "CCC staff have been added to the notification list for the final MND and the final action on the CDP." (See Attachment B, Response to Comment D-6.) On December 2, 2016, more than 10 days prior to the Board's action on the CDP, District staff emailed and mailed Coastal staff a "Notice of Board of Port Commissioners Meeting to Consider Adoption of Portside Pier Restaurant Redevelopment Project Final Mitigated Negative Declaration." (See Attachment E.) That notice, in compliance with the CEQA contained:
 - Written responses to Coastal's comment letter on the Draft MND;

- A CD of the Final MND and an internet link to the same;
 - The date, time, and location of the District Board meeting for consideration of adoption of the Final MND; and
 - A statement that at that same District Board meeting, "The Board will also consider authorizing issuance of a non-appealable Coastal Development Permit."
- After the District Board's action on the Non-Appealable CDP, District staff, in an email reply to Coastal Commission staff dated January 10, 2017, confirmed that the District Board approved the issuance of the CDP for the Project on December 13, 2016. (See Attachment F.) As referenced in District staff's email, the District is only required to send a "Notice of Board Action" to the Coastal Commission for appealable developments.

As District staff has conveyed to Coastal Commission staff in conversations on January 12, January 18, and January 20, 2017, District staff would like to maintain consistency in its CEQA and Coastal Act processing of projects. In Coastal Commission staff's email of January 13, 2017, it asserted that District staff has been providing Coastal Commission staff with Notices of Board Action on non-appealable developments (see Attachment G). This is unfounded, not required and cannot be relied upon under the law. District staff has reviewed its most recent practices in the past two years and has confirmed that it has not been providing such notices to Coastal Commission staff for non-appealable developments. Section 30717 of the Coastal Act and Section 11i. of the District's CDP Regulations do not require notice for non-appealable developments (see Section II of this letter for more discussion). In its January 13 email, Coastal Commission staff provided an example of a Notice of Board Action on a Non-Appealable CDP that District staff mailed to Coastal Commission staff in June 2013 (see Attachment G). This was almost four years ago and District staff has ceased preparing such notices as they are not required. Just because District staff used a practice not legally required in the past, does not mean it is required to continue to do so or do so now. Importantly, District staff has been emailing all CEQA/Coastal Determinations to Coastal Commission staff, as it did here. District staff has only been emailing CEQA/Coastal Determinations to Coastal Commission staff after a Board meeting if the Project involves a CEQA Exemption or a Coastal Exclusion.

The second example Coastal Commission staff provided in its January 13 email was a CEQA/Coastal Determination for Amendments to the Port Code relating to certain parking lots and meters. In this example, because it involved a CEQA

Exemption, the CEQA/Coastal Determination was provided to Coastal staff after the Board meeting, and a Notice of Exemption was filed with the County Clerk, to allow for the 35-day statute of limitations to begin on any challenges to the CEQA Exemption. Nonetheless, this was not legally required.

In the case of a project, such as here, which District staff determined to be a non-appealable development and prepared a MND pursuant to CEQA, District staff would have only provided the CEQA/Coastal Determination to Coastal staff prior to, and not after, the Board meeting. In addition, a CEQA/Coastal Determination should not be confused with a Notice of Board Action on a Coastal Development Permit; they are two separate documents and are provided at different times in the process.

IV. Establishing a 10-Day Appeal Period and Taking Jurisdiction of the CDP Are Illegal Actions

A. The Coastal Commission Is Not Authorized to Proclaim and Notice a 10-Day Appeal Period

Please take note that the Coastal Commission is not authorized under the Coastal Act to “announce and notice the beginning of the 10-working day appeal period” as threatened in the last paragraph on page two of the February 2, 2017 Letter. Section 30717 of the Coastal Act vests the District with that authority where an appealable development is at issue, which as discussed at length in this letter has not occurred here. Any such notice by the Coastal Commission – whether or not for an appealable development – would not be within the Coastal Commission’s statutory jurisdiction and would not trigger the statutory effect. The Coastal Commission is not authorized to assume authority vested in the District.

Additionally, Coastal Commission staff failed to cite to any regulatory authority for the alleged “dispute resolution” process it is claiming to institute. It appears that none exist for ports. Hence, using a sham process to get the issue before the Coastal Commission would likewise be in excess of the Coastal Commission’s jurisdiction and would infringe on the due process rights of the District and others affected by such an ad hoc procedure.

B. The Coastal Commission is Not Authorized to Hear an Appeal of a Non-Appealable CDP

As discussed at length in Section I of this letter, restaurants and dock and dine facilities are non-appealable developments. Hence, the Coastal Commission does not have jurisdiction to even consider an appeal, let alone find a substantial issue and hold

Deborah N. Lee
Melody Lasiter
February 6, 2017
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a de novo hearing on the CDP. Such actions would be made in excess of the Coastal Commission's authority and jurisdiction.

C. Interference with Prospective and Existing Contracts and Regulatory Takings Claims May Arise

The District and Anthony's are currently operating under an existing lease that requires Anthony's to vacate the premises, which includes removing all furniture, fixtures and certain other items. Pursuant to the lease, Anthony's has until May 1, 2017 to finalize these actions and any delay as a result of a Coastal Commission appeal would interfere with the District's contractual rights to have the premises completely vacated by May 1st. Additionally, the District and the applicant have been negotiating a lease for several months with the intent that the lease be finalized and approved by the District Board in the next couple of months. Any delay in the approval and execution of such a lease would interfere with the District's and the applicant's prospective contractual rights.

Moreover, because the premises is to be vacated by May 1, 2017, if not sooner, any regulatory action by the Coastal Commission that would temporarily or permanently foreclose demolition on the site and/or deprive a use of the premises would constitute a regulatory taking.

D. Coastal Commission Staff was Given Notice on January 10, 2017, 23 Days Prior to the District's Receipt of Its February 2, 2017 Letter and Any Appeal Would be Untimely

Additionally, while not required for non-appealable development, Coastal Commission was given notice on January 10, 2017, sixteen (16) working days from the date the District received Coastal Commission staff's February 2, 2017 Letter. Even if an appeal were legally available (it is not), any appeal by the Coastal Commission would be untimely. Section 30717 of the Coastal Act sets forth a 10-working-day appeal period, which here, expired on January 25, 2017.

Please contact me with any questions or to discuss the issue.

Sincerely,



Rebecca S. Harrington
Deputy General Counsel
San Diego Unified Port District

Deborah N. Lee
Melody Lasiter
February 6, 2017
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ATTACHMENTS:

- A: District Staff Report, District Board Resolution, District Staff Presentation
- B: Coastal Commission Staff's Comments on the MND; District Responses to Comments and Supporting Appendices to District Responses
- C: Superior Court Minute Order - *San Diegans for Open Government v. California Coastal Commission*; *San Diego Unified Port District*, Case. No. 37-2013-00057492-CU-TT-CTL (2013)
- D: Categorical Determination for the Project, Sent to Coastal Commission staff on December 1, 2016
- E: Correspondence and Transmittal for the of Final MND to the Coastal Commission
- F: Notice to Coastal Commission staff of District Board Approval
- G: Correspondence from Coastal Commission staff to District staff

cc: Randa Coniglio, District President/Chief Executive Officer
Thomas A. Russell, District General Counsel
T. Scott Edwards, District Vice President/Chief Operating Officer
Shaun Sumner, District Assistant V.P., Operations
Wileen Manaois, District Principal, Development Services



EXHIBIT NO. 9

A-6-PSD-17-0003

Parking Study Area

RECON

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Parking Facility
North Embarcadero and Adjacent Area



California Coastal Commission

I just read the article (enclosed) about the Coastal Commission objecting to the replacement project of Anthony's Fish Grotto restaurant in San Diego. The article mentions staff concerns with parking and rising sea levels.

Is staff not aware of the many parking facilities in downtown? Just down the street from Anthony's, at the Waterfront Park, is a wonderful subterranean parking lot. Many restaurant patrons are walking from nearby hotels and other venues in downtown where they may have parked. And what does rising sea levels have to do with rebuilding a restaurant in the same place???

These "concerns" make it obvious that the Coastal Commission is anti-business, anti-growth, anti-development, anti-consumerism and one of the most despised and dysfunctional governmental agencies that I can name!

How anything gets approved and built near the coastline is unbelievable!

Let a new restaurant be built and don't worry about the parking and rising sea levels.

John Jonkhoff

24748 Leafwood Dr.

Murrieta, CA. 92562

RECEIVED

FEB 17 2017

CA
COASTAL
SAN DIEGO

EXHIBIT NO. 10

A-6-PSD-17-0003

Public Comments



California Coastal Commission

San Diego Bay plan could be delayed

Coastal panel objects to restaurant project's design over concerns about access.

By ROGER SHOWLEY

SAN DIEGO — A \$13-million replacement project for Anthony's Fish Grotto, which recently closed after 71 years on San Diego Bay, ran into objections from the California Coastal Commission this week that could delay the project for months, if not years.

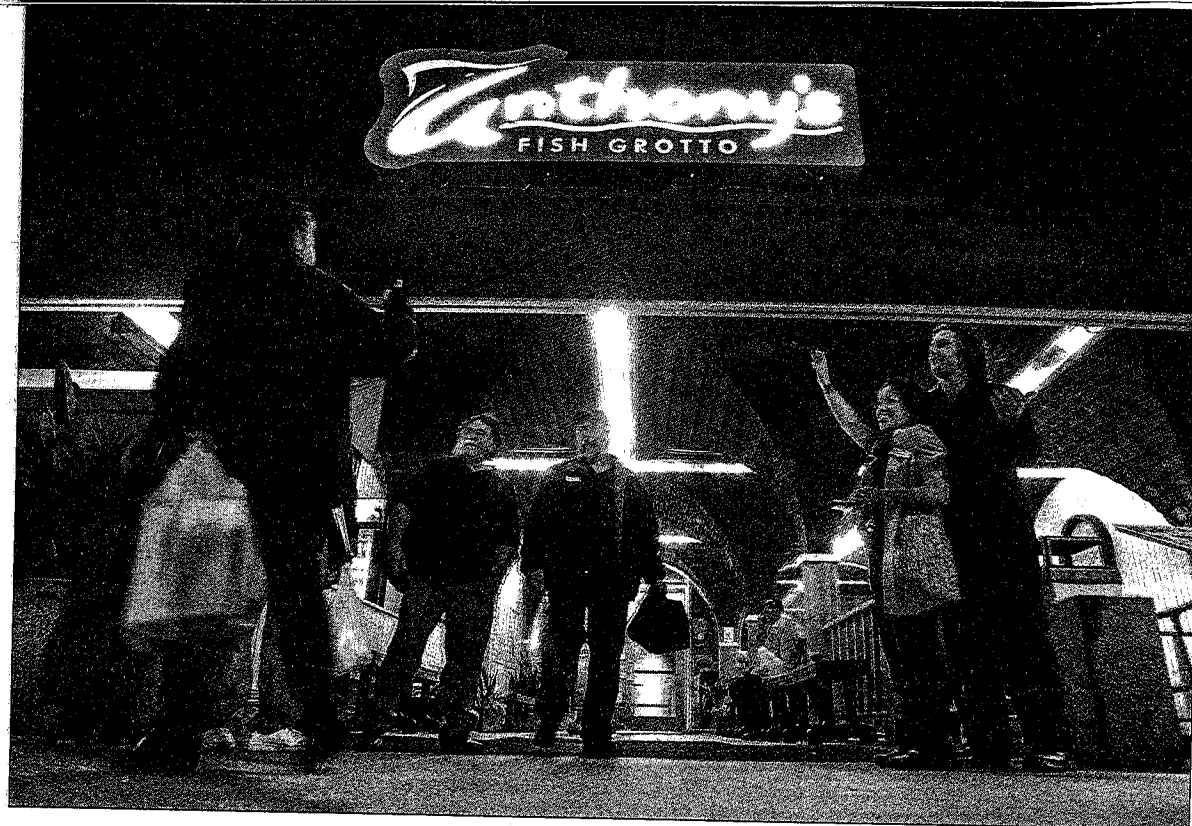
The commission staff gave developers 10 days to file an appeal, ending Feb. 21. Last year, the San Diego Unified Port District of Portside Pier approved a three-restaurant project by Brigantine Restaurants.

But the commission's staff raised concerns about public access, architectural design and additional coverage over the water.

The coastal staff also is sparring with the port district over jurisdiction. The port argues that the commission has no right to review restaurant projects, but the coastal staff says it does.

"As a steward of the tidelands, we are developing the port in a responsible manner," the port said in a statement. "It is not unusual for public agencies, in the course of our duties, to have disagreements. In those cases, the port works toward amicable resolutions."

Both design and appeal could come up at the commission's March 8-11 meeting in Ventura or in San Diego in May. If there is no resolution on jurisdiction or design issues, the project could end up in protracted



A REPLACEMENT project for Anthony's Fish Grotto, which closed after 71 years on San Diego Bay, was approved by port officials last year. The plan includes restaurants and a public viewing deck.

HAYNE PALMOUR IV San Diego Union-Tribune

negotiations or litigation. The port also stands to lose out on rental income from the Brigantine project if Portside Pier opens later than planned.

"That's not in anybody's best interest," said Brigantine President and Chief Executive Mike Morton Jr., referring to any lengthy delay.

Demolition of the Anthony's building is projected to begin by year's end with an opening next year. The Brigantine project still needs a go-ahead from the U.S. Army Corps of Engineers and the Regional Water Quality Control Board, Morton said.

In a letter to the port Feb. 2, the coastal commission's district manager, Deborah Lee, laid out her agency's views that restaurants are a form of "shopping facilities" that the California Coastal Act says the commission can review.

In its response Monday, the port's deputy general counsel, Rebecca Harrington, said restaurants are not explicitly listed as one of the things

the commission can review.

"A restaurant is not a 'shopping facility,'" Harrington said, and therefore Portside Pier's development permit cannot be appealed to the commission.

Anthony's, which began as a small diner near the old Coronado ferry landing at the foot of Pacific Highway in 1946, opened its most recent location covering 23,285 square feet in a one-story structure at 1360 N. Harbor Drive in 1966. The company had hoped to remain as part of a redeveloped restaurant complex on the site, but the port selected Brigantine instead. Anthony's served its last meal Jan. 31, and is moving to auction the contents this month and turn over the property to the port by the May 1 deadline.

Brigantine plans a 37,225-square-foot replacement on a slightly larger platform to accommodate a Brigantine on the Bay, Miguel's Cocina, Ketch & Grill Taps and a walk-up gelato and coffee bar. The 565-square-

foot dock-and-dine would be enlarged to 3,370 square feet to accommodate up to 12 vessels, and a second-floor public viewing deck would represent a new feature. A public walkway would surround the development.

Lee said the coastal staff does not think public access is sufficient, because visitors would have to walk through the restaurant to get to the walkway and observation deck. The proposed signs appear so small that many passersby might not realize those areas are accessible without having to buy food or drink. She also said the development, which will be built on top of new pilings, will cover more of the water than Anthony's.

In a letter to the port last summer, the commission staff also mentioned parking and lighting issues and the effect of rising sea levels.

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Showley writes for the San Diego Union-Tribune.